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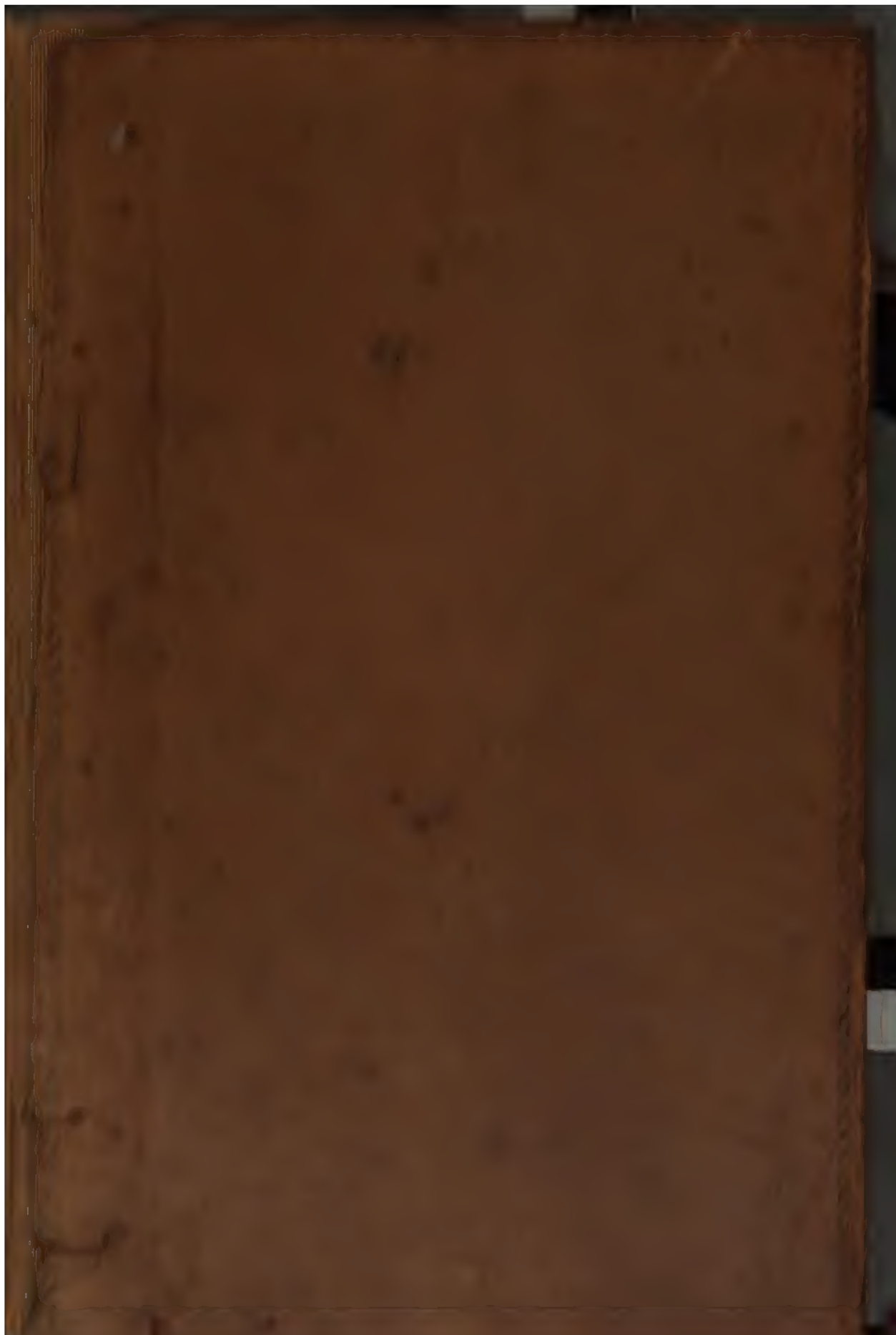
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The High Court of Chancery,

DURING THE TIME OF

LORD CHANCELLOR THURLOW,

OF THE SEVERAL

LORDS COMMISSIONERS OF THE GREAT SEAL,

AND OF

LORD CHANCELLOR LOUGHBOROUGH,

FROM 1778 TO 1794,

WITH

AN APPENDIX OF CONTEMPORARY CASES.

By WILLIAM BROWN, Esq.

BARRISTER AT LAW.

VOL. I.

THE FOURTH EDITION.

WITH

REFERENCES TO FORMER AND SUBSEQUENT DETERMINATIONS,
AND TO THE REGISTER'S BOOKS.

BY THE

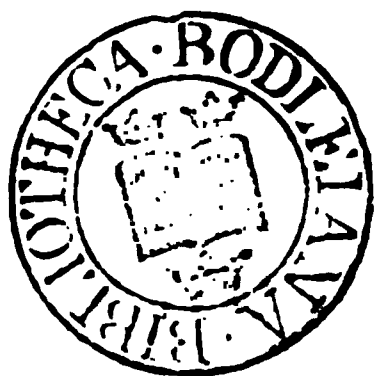
HON. ROBERT HENLEY EDEN,

OF LINCOLN'S INN, BARRISTER AT LAW.

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1819.



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TO THE

FOURTH EDITION.

THE Reports of Mr. BROWN, having been for some time out of print, the Editor has undertaken to prepare the present Edition for publication. To effect this object, in a manner that may render it worthy of the approbation of the Profession, he has revised the original Work with the greatest attention. He has added, to every case, notes of decisions, brought down to the latest period ; and wherever he thought that it might be useful, has subjoined a short digest of the doctrine, as subsequently varied or established. He has also consulted the Register's Book, in every instance in which he found that the correctness of the printed report had been doubted, or where it appeared to himself to be unsatisfactory.

The value of the present Edition will be found to be considerably augmented by the addition of the manuscript Notes of Mr. Serjeant HILL, with which the Editor has been kindly favored.

*Lincoln's Inn,
May 10th, 1819.*

TO
THE RIGHT HONOURABLE
EDWARD LORD THURLOW,
BARON THURLOW OF ASHFIELD,
IN THE COUNTY OF SUFFOLK,
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
&c. &c.
THE FOLLOWING REPORTS
ARE,
WITH THE UTMOST RESPECT AND DEFERENCE,
INSCRIBED.

PREFACE.

THE Notes from which the following sheets have been compiled were originally taken in a course of private study. This circumstance the Reporter thinks proper to mention, as, in part, accounting for what might, otherwise, be thought a want of uniformity in the method adopted.—Reporters, in general, and especially the more recent, have chosen one of the two following *manners* of arranging their matter; namely, either by giving the arguments of the counsel in each cause, in the order in which they respectively spoke; or by reducing the substance of the reasoning on each side of the question into one continued discourse. In the following cases, the Reporter has not confined himself to either of these methods, but has occasionally introduced both.—He is aware that each has its peculiar advantages: he thinks also that each has its peculiar defects. If the former possess more verisimilitude, and exhibits more fairly the topics used by each individual speaker, it is more apt to draw the report into prolixity and repetition. If the latter have more art in its construction, and method in conveying the argument, it must frequently occasion omission, where different speakers proceed by different trains of reasoning, though tending finally to like conclusions. In the courts of law, where, in special arguments, one counsel only on each side is heard on the same day, and the majority of cases receive judgment in that stage; or, if argued again, are treated nearly in the same order, the latter method of reporting

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ing will almost always be preferable: but in a court of equity, where all the counsel for each party are heard through; and, from being differently prepared, adopt different *media* of proof, the former mode of arrangement will frequently be necessary, in order to lay the whole argument before the reader. In the first settling of the Reporter's notes, each had been preferred as it seemed best to suit the purpose of the particular case, and in afterwards revising them, with a view to publication, it was found that it would have been difficult to re-cast them differently from their original form; and that, in many instances, it would have been a sacrifice of much time and labour, to advantages which, at best, appeared to be but problematical. It had, however, been originally attended to, and now became a principal object, that the arguments of such counsel as spoke later in the order of each cause, should be *retained* only in so much as they either introduced new reasons upon the subject, or set those before used in a clearer or more forcible light; and that where the method of a regular discourse was adopted, it should contain the whole matter, although it could not preserve the manner of each speaker, it being absolutely necessary to give the argument in a concentrated form.

The Reporter feels it incumbent upon him to say a few words respecting the Notes. The number which will appear, upon turning over the volume, may perhaps mislead the reader with respect to their object; which is to introduce, with brevity and accuracy, the circumstances of the cases cited or alluded to by the Bench or Bar, but not fully stated by either; and which, from the long intervening period from the publication of the last Equity Reports to that of the following sheets, do not appear any where in print. Some cases already printed are corrected by more accurate states than those in the books: but, in general, they consist of new determinations by the Lords *Northington*, *Camden*,
and

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and *Bathurst*. In a very few instances, where the novelty of the cases, or their having been considered as precedents in subsequent adjudications, have been the inducement, the arguments upon which they have been determined have been given more at large: it is hoped these will appear sufficiently important to merit the distinction. The Reporter begs leave to desire the reader will form no expectation of any observation or comment upon either argument or adjudication: he thinks these far beside the office he has undertaken; the duty of which he conceives to be restrained to the relation of facts which really pass, without presuming to offer a judgment upon them.

In compiling the Tables, the convenience of the reader has been the principal guide. The first, of Names of Cases, is formed in the, now, usual manner for finding the case by the name of either plaintiff or defendant. Into the second, of Cited Cases, none are admitted but such as either are stated or corrected in the text or notes. The Third is so constructed as to form a digest of the whole; by briefly stating the point determined, and adding the name of the case; which may sometimes save the trouble of turning to the body of the work, and facilitate its use in practice.

The Reporter cannot conclude without expressing his acknowledgments for many favours received in the conduct of his undertaking. He is particularly under obligations to his * Honour the Master of the Rolls, for introducing his manuscript to the notice of the *Lord Chancellor*; to Lord *Loughborough* for his kindness in reading a considerable part of the work, and for the unexpected favour of applying to Mr. Justice *Ashurst*, for his notes of the cases argued before them and Mr. Baron *Hotham*, as Lords Commissioners of the Great Seal; and the learned Judge for his ready compliance with the request; to which the Re-

* Sir *Lloyd* (now Lord) *Kenyon*.

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porter is indebted for much of the value of that part of his work. To the gentlemen at the Bar, who have favoured him with their assistance, he will only return general thanks: though he must ever feel his labours sanctioned by their communications, as well as himself honoured by their friendship.

*No. 2, Pump-Court, Temple,
28th Nov. 1785.*

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TO

THE SECOND EDITION.

IN re-committing the following sheets to the press, it has been the Reporter's endeavour to render them as worthy as opportunity admitted of the obliging reception the former edition received from the Profession. With this view, the cases, the accuracy of which he has never heard impeached, have been carefully revised; and some corrections (he has the satisfaction to say, not of great importance) have been made: some of the cases cited in the notes have been more fully stated, a number of new cases added, and many references made to subsequent adjudications, which tend to confirm or illustrate the points to which they are adduced; as well those contained in his second volume, as others of which he has not complete statements. An Appendix is also subjoined of Contemporary Cases, with those before reported; but of which he either had no notes, or such as were too imperfect for publication: they are the communications of gentlemen, who have obligingly contributed to render this work as complete a report as might be of the determinations during the time it professed to embrace; and entitle them to his warmest acknowledg-
ment.

Pump-Court, Temple,

March 8th, 1790.

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TO
THE THIRD EDITION.

ON occasion of printing the Second Edition of the present Volume in 1792, the Author was indebted to several of his friends, of considerable eminence as well as experience in the Profession, for the communication of many valuable Notes, of which he availed himself in that republication, for the purpose of correcting and illustrating various Cases as they stood reported in the First Edition, printed in 1785; many of those Notes being inserted at the foot of the page, and others forming an Appendix of Contemporary Cases. Most of these Additions were communicated to the Reporter by a gentleman now of high rank in the Profession; to whose obliging condescension this present edition is still further indebted for many important corrections. A considerable Number of occasional amendments throughout the work, and of References to later determinations in the Courts of Equity, have also been supplied by other professional friends of the deceased Reporter: With these additional improvements it is presumed that this edition will, not only in point of size and reduction of expence, be deemed more convenient and acceptable, but in respect of its contents be found more correct and useful to the Profession than the preceding one.

Jan. 14, 1801.

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ARGUED AND DETERMINED

IN THE

High Court of Chancery.

TRINITY TERM.

18 GEO. III. 1778.

EDWARD Lord THURLOW, Lord High Chancellor.

Sir THOMAS SEWELL, Knight, Master of the Rolls.

ALEXANDER WEDDERBURN, Esq. Attorney-General.

JAMES WALLACE, Esq. Solicitor-General.

GWYNNE v. HEATON and others.

S. C.
11 Serj. Hill's
MSS 549.

THIS was a bill filed to be relieved against a bargain, as unconscionable, under the following circumstances:—By the will of the plaintiff's grandfather, the family estate was left to the plaintiff's father for life, the remainder to first and other sons in tail-male; the estate was £2,000 *per annum*.—The father being eighty-one years of age, and the son twenty-three, seised of this estate tail in reversion, having offended his father by an imprudent match, in consequence of which he and his wife were turned out of doors, advertised in the public papers, a reversionary annuity of £300 after the death of a man of great age.—The defendant's father (who knew the age of the plaintiff's father) applied, and the annuity was sold to him on the following terms: the reversionary annuity in fee, after the death of the father, was valued at seventeen years purchase, amounting to £5,100.—Heaton was to grant to the plaintiff an annuity of £400 for the life of the father, which was valued at seven years purchase £2,800, and to pay to Gwynne the remaining sum of £2,300.—Accordingly, by

Grant of a reversionary rent-charge, after the death of plaintiff's father (who was old and infirm) upon unreasonable terms, set aside, but to remain as a security for the money really advanced, and costs to be paid as in redeeming a mortgage.

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deed bearing date the 12th of *June*, 1773, the rent-charge was granted in consideration of £5,100, with a covenant to levy a fine at the expence of *Gwynne*, and a bond of equal date in £10,000, penalty was given to suffer a recovery when he should come into possession.—By deeds of equal date, the annuity of £400 *per annum* was granted to *Gwynne*, secured by a transfer of long annuities to *Heaton* the son (the present defendant), and the defendant *Baker*, a friend of *Heaton's*, with power to *Heaton*, in case of the death of either of them, to appoint new trustees. It does not appear whether this transfer ever took place. It was agreed between the parties, that the fine should be levied immediately, and the expence deducted out of the first payments of the annuity; the fine was accordingly levied at the great sessions (the estate being in *Caermarthenshire*), and a charge made for the expences of £314. 15s. 2d. Deducting this sum for expences, £85. 4s. the balance of one year's annuity only was paid, though the father survived eighteen months. There was no confirmation of the bargain by *Gwynne*, upon the death of the father, but he offered the present defendant *Heaton* (his father being then dead) £1000 to cancel the deeds; which being refused, this bill was filed.

Mr. *Attorney-General*, and Mr. *Price*, for the plaintiff (after stating the case): On the part of *Heaton*, the defence is, that this was the offer of *Gwynne*, and that it was only a good bargain: It is true, a bargain is not to be destroyed where there is any measure of equality. In those cases, it is always upon the proposal of the person who is to give the good bargain. Take the comparison; an annuity in fee, at the death of a man eighty-one years old, is estimated at seventeen years purchase, and the life of eighty-one, at seven years purchase, for which two years purchase is the utmost value upon Dr. *Hulley's* calculations. This is decisive against *Heaton*; it is an advantage that no man in a common situation would accede to: *Gwynne* is to give every possible security, and at his own expence, and, on the other side, to submit that *Heaton* should name the trustees, and, upon the death of either, should appoint new ones. This is contrary to the common mode of dealing between man and man, and it is taking an unconscientious advantage of his situation. In matters of a common kind, if a purchaser has a little advantage, the Court has it in its discretion, whether to take it away. From the time of Lord *Guildford*, to the present, there is no case like this, where relief has not been granted, except upon a confirmation*. He was doubtful in *Nott*

* See what Lord *Hardwicke* says on the subject of confirmation, *Cole v. Gibson*, 1 Ves. 503. and seq. (a)

[(a) Et vide *Stephens v. Lord Bateman*, post, 22. *Carpenter v. Heriot*, 1 Eden, 338. *Crowe v. Ballard*, post, vol. iii. 117. S. C. 1 Ves. jun. 215. 2 Cox, 253. *Murray v. Palmer*, 2 Sch.

& Lef. 486. *Morse v. Royal*, 12 Ves. 355. *Roche v. O'Brien*, 1 Ba. & Be. 330. *Wood v. Downes*, 18 Ves. 120. *Dunbar v. Tredennick*, 2 Ba. & Be. 304.]

v. Hill, 1 Vern. 167. whether this Court could meddle with a legal security, but that cause was reheard before Lord Jefferys, and reversed as being an unconscionable bargain. According to the decision in that case, have been *Berney v. Pitt*, 2 Ch. R. 396. 2 Vern. 14. *Wiseman v. Beake*, 2 Vern. 121. where the plaintiff was not a young heir. *Twistleton v. Griffith*, 1 P. W. 310. *Curwyn v. Milner*, 3 P. W. 292, (note.) *Cole v. Gibbons*, 3 P. W. 290. *Sir William Stanhope v. Cope*, 2 Atk. 231. *Lord Chesterfield v. Janssen*, 2 Ves. 125. and 1 Atk. 301. where Lord Hardwicke's principle was, that wherever there was an unconscionable bargain entered into by a young heir, this Court should relieve.

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Mr. *Ambler* (for the defendant): Mr. *Heaton* did not in general deal in annuities.—It is not necessary in this case to consider the case of young heirs dependant on their parents.—This is the case of a gentleman living on his own fortune, applied to by the plaintiff, invited into the bargain, and the terms deliberately settled by the plaintiff and his friends.—The question is singly, whether this agreement is upon such an inadequate consideration that this Court will set it aside. The plaintiff was intitled to a remainder in an estate of £2,000 a year, with limitations over to his brother and several other persons, and had incurred the displeasure of his father, by marrying a servant in the house; on which account his father, at his death, gave all the property he could dispose of to the second son. The plaintiff put the advertisement into the papers, offering the rent-charge of £300 upon the death of an aged person.—His agent wrote to the defendant, proposing the terms both for the perpetual rent-charge, and for the annuity; and it comes out in evidence, that the same terms had been proposed to other persons.—The plaintiff was advised that all that he could do was to levy a fine, which would bar his own issue, but could not suffer a recovery till the death of his father.—The plaintiff told *Heaton*, that he had given his agent authority to propose the terms.—The fine was levied, and the £2,300 paid; the plaintiff was perfectly satisfied that *Heaton* should name the trustees.—If the father had lived seven years, there could not have been a pretence to come into this Court to set the transaction aside.—There have been a multitude of cases in this Court, where persons have obtained an advantage, not by fraud, but by a fair bargain, that the Court would not deprive them of it.—The old gentleman had no infirmity, or circumstance of disorder, to shew him to be in danger of dying.—This is not such a consideration as this Court will think unreasonable, and set aside.—Was there no risk to be run by Mr. *Heaton*? I have stated that he could not have the rent-charge till the death of the father; he has it not now, and if no recovery should be suffered, and the plaintiff not have a son, he never may have it: therefore it depends upon the contingency.—This is not a bill by *Heaton*, to compel the suffering of a recovery; if it was, perhaps

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the Court *might* refuse to assist him: I do not know that the Court would refuse.—Upon the whole, the circumstances are not such as to make void the transaction, they are not unreasonable or unconscientious terms.—The cases all stand upon their *own* circumstances; the only resemblance this bears to them is, that it is the case of an estate tail, *after the death* of the father.

Mr. *Mansfield* (on the same side): Every proposal came from *Gwynne*: there was no haggling about the price; but his language now is, I think I have given too much, and therefore I come into equity to rescind the transaction.—This is the fair representation, but the most extraordinary case ever produced.—The draft was approved by counsel, on the part of *Gwynne*.—He is not a young heir in the sense of any of the cases, nor is this at all like them.—As to the trustees being named by *Heaton*: it was of more consequence to him than to *Gwynne* who were the trustees, as the long annuities continued his property, though they were a security for the annuity.—The trustees are not impeached, no objection whatever was made at the time, how can it be objected as a mark of fraud now? As to the rent-charge being free from land-tax, the agreement was to grant a *clear* rent-charge: to be so, it must be free from land-tax.*—As to the expences being deducted, *Heaton* gets nothing by that; the borrower always pays expences; which were increased by the journies, and the expences in the court of great sessions, which are very large, compared with those in the *Common Pleas*.—How is *Gwynne* a young heir? He is not a young man following expensive pleasures.—What would a prudent man advise him to do, but to procure a permanent provision during the life of his father? Is there any ground of policy here to overturn a bargain, the object of which was a provision for himself,

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* This point has been much contested. In *Brewster v. Kitchen*, 1 Ld. Raym. 317. 1 Salk. 198. a *clear* annuity was held to be free from land-tax. But in the case of *Green v. Maygold*, 8 Vin. Abr. 411. tit. *Devise*, £30 a year was to be paid *free* from all deductions, the Master of the Rolls held land-tax not to be one of those deductions. In the *Duke of Ancaster v. Lady Sherrard*, 2 Ves. 499, jointures, not exceeding £1,000 per annum was held not to be free from land-tax. In *Villareal v. Lord Galway*, Lord Camden was of opinion that such a rent was not clear of land-tax, the words of this devise may be seen post, 292. n. where it is cited for another purpose. His Lordship's reasoning on this part of the case is as follows: "The question then is, whether the rent-charge is to be free from land-tax by these words, 'clear yearly payment.' I am of opinion it is not, because all such rents are charged with the land-tax by the act of parliament, with this exception only, that the act shall not make void the agreement between landlords and tenants. This act is an annual charge, and every person possessed of such an estate, must take it with its parliamentary burthen, unless the grantor has expressly discharged it; the land-tax is a collateral duty imposed by the legislature, and must therefore be paid by the owner of the rents, unless it be otherwise agreed between the parties and so expressed. Notwithstanding these cases, however, the point seems at present to be settled, that such a rent-charge is free from land-tax." See *Bradbury v. Wright*, Dougl. 602. citing the case of *Champernoon v. Champernoon*, Ch. 1780, where the words were "free from taxes," and the annuity was held to be clear of land-tax.

his

his wife, and a probable family during the life of his father? Are the means by which he got that provision improper? He could give no security; what could he do more proper than to grant a rent-charge out of the estate? This is not a rent-charge to exhaust the estate, to render him indigent when he should come into possession of it; the means are not reprehensible in any respect.—This is not within the ground of the cases.—The only ground here is, that by the means of certain calculations they have found out that the sum is too large.—There is no case where the price of contingencies has been the ground for setting aside a bargain.—Calculations, though very useful as to large numbers, do not apply to individuals. As far as these observations have weight, they afford an answer to the cases.—The cases are very short.—In *Nott v. Hill* no circumstances are stated; but, upon the face of it, it was very enormous, it was to make the man a beggar after the father's death.—*Berny v. Pitt*, was on the ground of his being a young heir, whose extravagance was fed by usurers.—*Wiseman's* case is not of so young a man, but the Court was struck with the enormity of ten for one.—*Twistleton v. Griffith* shews a reason for the determination, it was fraudulent and deceitful; the purchaser had advised the son not to sell the reversion to his father; this bears no resemblance to the present case, where there is no artifice or misrepresentation.—In *Chesterfield v. Janssen*, it is laid down, that every case must depend upon its *own* circumstances; and it is enough, in the present case, that there are no circumstances of fraud or misrepresentation, and that the plaintiff is not a young heir, in the sense here meant.

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Mr. *Madocks* (on the same side):—The event can make no alteration, when the conveyance is perfect, though it does where the contract is not executed, as where the party dies before the execution of the deeds.—It must be taken as it stood at the time when it was proposed to *Heaton*: and the question is, whether he ought or ought not to have taken it?—If he ought to have refused it, as being an unconscionable bargain, it must be on the ground that it was with an heir in distress, apparently an unconscientious bargain.—The Court cannot set aside a bargain even on account of a monstrous advantage taken. 2 Atk. 251.—It must be either marriage brokage, or made with an heir or person in distress. *Batty v. Lloyd*, 1 Vern. 141. *Hobson v. Trevor*, 2 P. W. 191. *Dems v. Brandt*, Sel. Ca. ten. Ld. King, 7. (13 Vi. 548.)

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Lord Chancellor.—A remainder-man may sell, or give away his remainder, and the Court will not take it away from the purchaser or donee.—An inadequate consideration is not *alone* sufficient to vitiate the contract, although in order to do so, the consideration *must* be inadequate; where it is sold for a sum grossly inadequate, the Court has never suffered it to stand.—There is no

case

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case in the books very like this.—Here the evidence is not sufficient between the parties.—That read this morning, (the defendant's) does not contradict the father's being more infirm at the time of the transaction than formerly.—The cause has been brought on rather too carelessly, they should have stated the real proportion of value, in order to show whether it was grossly inadequate.

Mr. *Bicknell* (on the same side) cited *Gilb. Chan.* 291, 292. that where the father withholds subsistence from the son, if he enters into such a contract, equity will not relieve against it.

Mr. *Attorney-General* (in reply):—It is extraordinary to contend that the Court will not assist the plaintiff, though it would not assist *Heaton* in a bill filed to compel the suffering a recovery. No case puzzles me so much as one where the Court will assist neither party.—It is certainly true, that courts have no censorial authority, but it does not follow from thence, that they can give no relief.—The rules of morals, *honeste vivere, alienum non lædere, suum cuique tribuere*, do not all apply to courts of justice.—*Honeste vivere* is not their object, *suum cuique tribuere* is their proper ground, but they will prevent one man from injuring another: on this foundation stands the action upon the case.—If the bargain is beyond the limitation the law has fixed, it will punish. But there are cases which are not illegal, but which still are unconscientious.—If a man finds another in distress, and supplies him on unconscientious terms, the Court, in relieving him, enforces the rule of morality.—The naming the trustees, and the power of appointing in case of death, are not answered by their being honest men; had the parties been on equal terms it never could have been so.—There is no evidence that the four *per cent.* annuities were ever transferred; no declaration of trust appears: this is very unequal to the security given for the rent-charge.—But take it from the answer, that the four *per cent.* annuities were transferred in *December*, the treaty was in *June*: the one party had the whole security immediately: the other had not the security he treated for, which was to be as good as that given for the rent-charge.—The construction of the words *clear rent-charge* does not admit of a doubt; even at market a clear rent-charge means subject to land-tax\*.—As to the enormous sum paid for the fine, it has been treated as wise in *Gwynne* to come to *Heaton* for an immediate subsistence; surely he did not mean in 1773, to purchase subsistence in 1775, the fine amounted to three-fourths of the first year's annuity.—Then it is said, that this is not the case of a young heir.—I do not presume the Court has gone on the idea of relieving the father.—*Gwynne* was a young man just of age—his

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\* Vide ante, p. 4, note,

estate was expectant—he was just in the situation of an apparent heir—he must have applied to his father, if he had not found a money-lender, and have settled the estate; which the father would have done for the sake of the second son. *Nott v. Hill* was a fairer case than the present; *Curwyn v. Milner* was a bold speculation.—*Dews v. Brandt* is reported in a very idle book; I have understood the determination in that case was different.—In these cases the parties never can be upon equal terms. The circumstances put calculations out of the case, the amount must be three or four times the principal money. This is apparently exorbitant: to buy a remainder in fee at seventeen years purchase, the life must be of very considerable value, it cannot be worth only seven years purchase.—The circumstances put together shew the bargain to be enormous. As to not taking notice of the event, I do not desire a casualty to be considered; but what at the time was most probable to happen should be considered, and that *Heaton* paid only the £2,300.

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*Lord Chancellor.*—As you shape your case, £2,300 only was advanced, and there was an exorbitant bargain for the £2,800. Where a mortgage is to be redeemed, it must be upon payment of the principal, interest and costs.

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This bill is brought to be relieved against a conveyance of the 12th of June, 1773, stating the interest of *Gwynne* in his father's estate, and conveying a rent-charge of £300 per annum, and also against a bond, in the penalty of £10,000 with a warrant of attorney to confess judgment, for carrying that agreement into execution, on the ground of gross inequality, and as being entered into by a man who had an estate tail, expectant on the death of his father: and it takes in a great many fraudulent and oppressive circumstances, but these are not proved. *Gwynne* made the offer in its extent to *Heaton*, who received it in the very shape in which it was offered. This excludes every suggestion of express proof of deceit by *Heaton*, in whom no confidence was placed, nor any assumed by him. There is no express proof of *Heaton's* labouring *Gwynne* to obtain a better security than was offered to him; he is not charged with misleading his judgment, or tampering with his poverty (a). On the other hand, the terms are so very grossly unequal, as to deserve all that has been said to be necessary to the setting the bargain aside. He was a young man of twenty-three, married, contrary to the inclination of the father, to a young woman, by whom he has children, though not male issue, who therefore do not succeed to the estate tail. The father was at least seventy-nine, according to the plaintiff's evidence, and had additional signs of immediate decay. On the part of the defendant only two witnesses have been read: one says, his health was better than his spirits; the

[ (a) Vide *Bowes v. Heaps*, 3 V. & B. 119.]

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second, a servant who had lived in the family some years before, remembered his master's state of health at that time, which was in general that of a man of his age, he returned into the service the beginning of the month in which this transaction began, and says, that he now found him remarkably changed for the worse, and that he was obliged to have a servant sleep in the room. The apprehension of dissolution began to prevail with himself and all about him : This situation appears to be perfectly known to *Heaton*. This is sufficient to support those witnesses, who say, that one or two years purchase was the full value of his life. I am the fuller in stating these circumstances, because the agents should have been more careful in procuring evidence. To set aside a conveyance, there must be an inequality *so strong, gross and manifest*, that it must be *impossible to state it* to a man of common sense, *without producing an exclamation at the inequality of it*. The principle then is loose enough—looser than I wish to be established in a court of justice.—But to reverse the principles which have been laid down by successive great names would be to alter the rules of property. In the present case the considerable inequality is referable to cases already determined. There is an extraordinary anxiety in the preamble of the deed, to state the circumstances, so as to take it out of the objections in former cases ; this is a strong circumstance to shew that the parties thought it would be liable to be set aside. The rule therefore must be attended to. It is said, a bargain cannot be set aside upon inadequacy only.—If parties are of full age, treating upon equal terms without imposition, and there is an inequality, even if it is a gross one, the Court in general has not set it aside. The nearest instance which I recollect of the Court's relieving in such circumstances, is *Sir Thomas Meers's case* (cited in *Forr.* 40). That case stands alone, if considered as bearing analogy to the present. That was not the case of an expectant heir ; but between persons standing indifferently ;—and it has always been held that interest upon interest was unconscionable. It has also been said that the owners of reversionary interests are as competent to dispose of them as the owners of other interests.—In the modern cases this is allowed, with the qualification that there is a policy in justice, protecting the person who has the expectancy, and reducing him to the situation of an infant, against the effects of his own conduct. The Court avows the disability, but not the length to which it disables. *Lord Ardglass and Pitt*, 1 Vern, 239.—It is very difficult to state the analogy between our law and the *Roman*, with respect to the protection of children in the life-time of their parents. *Lord Hardwicke*, in the case before him, referred to the *senatus consultum Macedonianum*\*. The principle is recognized, and the rule laid down in 3 P. W. (*Cole v.*

\* See Dig. 14. T. 6. As to the law of Rome, on the subject of the contracts of minors see D. 4. T. 4. also Domat. B. 4. T. 6. § 2. and see the same excellent writer, on the vices of covenants. B. 1. Tit. 18.

*Gibbons*, 3 P. W. 290.) and the Court has proceeded upon it for near a century. The practice has overturned the rule upon which *Nott v. Hill*, 1 Vern. 167. was determined. The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. This must be taken to be the established principle. But it is objected that here the son had no allowance.—That circumstance occurred in many of the cases. *Nott v. Hill* had every thing in its favour; the father was corrupt, it was clear of fraud, except such as arises from inequality only. In *Barnardiston v. Lingood*, (2 Atk. 133.) and *Chesterfield v. Janssen*, Lord Hardwicke treats inequality as a mark of fraud. *Curmyn v. Milner*, was perfectly free from fraud, it was £500 to pay £1,000 on the decease of either of the parents; he paid the money, and afterwards brought his bill, and was relieved on the same ground with the relief against marriage brokage bonds. In those cases, fraud is not the ground of relief; it is the example and pernicious consequences. It is contended that this case is not within the view. I think no man's case can be more so than an heir expectant of an estate tail, and the father in possession of another estate; so that he stood fully in the situation which has served as an example of unequal dealing in former times.—Its being mere subsistence, he having no allowance from his father, is no objection: that was the situation in *Nott v. Hill*, and in *Twistleton v. Griffith*, and is therefore no bar to the relief.—Its being hawked about, is not an objection, as it only shews the necessity he was under.—The main evidence relied upon by the defendant, is that of the agent who transacted the business, and who knew at the time that he was transacting a matter of some legal danger. The deed of the 12th of June, 1773, granting the rent-charge, recites a calculation of the value of the annuity, at seventeen years' purchase; that *Gwynne* was desirous to sell, and had caused it to be advertised, that *Heaton* applied in consequence to *Gwynne*, and his agents, who proposed to secure it on the estate tail, and therefore in consideration of £5,100 he bargained. The circumstances of the long annuities not being transferred, for some time after, is not of great weight, as the security was good. The trustees being named by the advancer of the money, rather shews the superiority of fortune, than renders it insecure. It then comes to this; that *Heaton* the purchaser, knowing the actual state of the lives for which he was bargaining, the inequality which that introduced, and the indigence of the man with whom he was contracting, makes a bargain with him, which appears as enormous as that of *Nott v. Hill*, without one circumstance to cast a shade over the case. The deeds must be set aside.—Then on what terms must it be? The conveyance must remain as a security for all

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all the money really advanced, and this must include the expence of the securities. The insurance, as far as it goes to the £2,300, must certainly be taken in; and I am inclined to think, that upon the contingency must also be allowed. Interest must be computed upon what he has so paid, from the time of payment. Then this reduces it to the case of a mortgage, which includes the costs of working out the redemption, unless the conduct of the mortgagee requires a difference. It was so done in the case before Lord Comper, in *Williams (Twistleton v. Griffith)*, Lord Chancellor directed full costs, and this is explained liberal costs. But there are circumstances in this case that particularly lead me into this determination: The plaintiff has not, in the bill, put this case upon the point on which he is to be relieved. It appears to me, that he, like another mortgagor, should pay costs of the redemption; but I should be glad to hear if the plaintiff's counsel have any objection.

Mr. Attorney-General cited *Lawley v. Hooper*, 3 Atk. 278. and Lord Chancellor said he would think about the costs.

Accordingly on the 28th of July, at Lincoln's-Inn-Hall, Lord Chancellor said, the money really advanced, must be paid with interest, together with the expences of the deeds, and insurance, and the costs of taking the account must be added, for that must be in every case (a); although it seems very hard, where a contract is set aside upon an equitable ground, that still the contract should remain a security for all the costs generally, and which have been occasioned by the defendant's putting the plaintiff to the necessity of filing a bill, and by his defending a contract which ought not to stand; but the defendant to have no other costs* (c).

* Vide *Henley v. Aze*, post, vol. ii. p. 17. and *Heathcote v. Paignon*, ib. 167. and *Fox v. Mackreth*, ib. 400. (b)

[(a) As to the question of costs, vide *Innes v. Jackson*, 16 Ves. 356. *Peacock v. Erans*, ib. 512. *Gowland v. De Faria*, 17 Ves. 26. and the note to the case of *Morony v. O'Dea*, 1 Ba. & Be. 121.]

[(b) The subsequent cases in which the subject of inadequacy of price has been considered, are *Spatley v. Griffiths*, post, vol. ii. 179. n. *White v. Damon*, 7 Ves. 50. *Low v. Burchard*, 8 Ves. 133. *Coles v. Trecothick*, 9 Ves. 234. *Burrows v. Lock*, 10 Ves. 470.

Mortlock v. Buller, ib. 292. *Underhill v. Horwood*, ib. 209. and 14 Ves. 28. *Louther v. Louther*, 13 Ves. 95. *Western v. Russell*, 3 Ves. & Bea. 187. *McGhee v. Morgan*, 2 Sch. & Lef. 395. n. Et vide *Stgd. Vend. & Purch.* 226. et seq. and the other cases cited, ib.]

[(c) As to contracts with expectant heirs vide *Coles v. Trecothick*, 9 Ves. 234. *Peacock v. Erans*, 16 Ves. 512. *Gowland v. De Faria*, 17 Ves. 20.]

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RICHARD Holt, possessed of a considerable personal estate, made his will the 6th of October, 1769, and, after giving various legacies, disposed of the residuum of his estate as follows:— He gave one half thereof to the *Foundling hospital*, and the other moiety to the *Lying-in hospital*, and if there should be more than one of the latter, then to such of them as his executor shall appoint. He then appointed _____ of *Castlegate*, his executor; but the testator afterwards struck out the executor's name, and appointed no other executor, and died in 1775. *Benjamin White*, the plaintiff, proved the will as a testamentary paper, and took administration with the paper annexed, as one of the next of kin. The defendants are the other next of kin, and the governors of the *Foundling hospital*, and of the several *Lying-in hospitals*. The plaintiff in his bill insists, that the devise of the moiety to the *Lying-in hospital*, became void by striking out the name of the executor, who was to appoint, and that it should be referred to the Master, to report who are entitled as next of kin, and offers to account under the direction of the Court. The defendants, the next of kin, also claim that moiety as being void. The governors of the *Foundling hospital* claim the moiety bequeathed to them. The governors of the several *Lying-in hospitals* submit their several claims.

Testator gives a moiety of the residue, to such *Lying-in hospital*, as his executor should appoint; he afterwards strikes out the executor's name, and dies without appointing any other executor; this is no revocation of the legacy, but the Court will appoint.

Mr. *Maddocks* for the plaintiff:—So much of the will as is not obliterated, must be protected.—If the devise had been to the *Lying-in hospital*, parole evidence must have been admitted, to have explained what hospital he meant: but the testator was aware of this, and took care there should not be a latent ambiguity, he therefore referred it to his executor which should take. Then, the appointment being revoked, the devise itself is revoked, for there is now no person existing who can appoint. How far they will argue that it devolves upon the Court to judge, I know not; but the cases will not support them in that doctrine. In *Lady Downing's case*, where the college was pointed out, together with the statutes by which it was to be governed, the Court held, that they had sufficient demonstration of the testator's intent to carry it into execution. So, where money is to go to charity generally, it devolves upon the crown to mark out the charity. Where it is left to a superstitious use, the crown shall appoint the charitable use to which it shall be applied. That is not this case; here is no sufficient demonstration that it should go to a *Lying-in hospital*. In the case of a private charity, the intent of the testator has greater weight than the jurisdiction of this Court, which can only be subsidiary. He having said the executor only shall appoint, and the testator having revoked his name, he meant to revoke the devise.

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Mr. *Mansfield*, (for the hospitals):—The obliteration of the name shall not defeat the intent, so as to prevent the money from going to some one of, or all, the *Lying-in hospitals*. It is impossible it should go as it was left; but, under all the cases, the Court will stand in the executor's place. All the rules shew great latitude, and liberality of construction.—The only rule with which I have any thing to do is, that where the testator refers to any person who cannot act, the Court will carry the devise into execution as near as may be. The cases prove that, where money is indefinitely given the Court will exercise its judgment: If he had given it to such charity as the executor should name, the Court must have applied it*. Then if it was to exercise so large a power, why should it not exercise the more limited one? So if it had been to the hospital the executor should name, in this case, perhaps, the executor would not have been limited to give it to one hospital only.—There are cases that come up to the present point—*Attorney-General v. Syderfen*, 1 Vern. 224. where the presumption was, that the testator had destroyed the writing, which is full as strong as revoking the name of the executor. In *Doyley and others v. The Attorney-General*, 4 Vin. 485. 2 Eq. Ab. 194. the discretion devolved to the Court. In *Bailis and Church v. The Attorney-General*, 2 Atk. 239, the alderman, and principal inhabitants of *Bread-street ward*, were appointed to distribute the charity. There is no more difficulty in finding out which hospital is the most proper object of bounty, than which dissenting ministers could not be supported by the people. In this case, the discretion is brought within much narrower limits than in the former ones. It seems to me, the executor would not be confined to one hospital.

Mr. *Mudocks* (in reply):—It is clear the testator only meant it should go to one *Lying-in hospital*.—Then the referring to the executor excludes every other power in the world from the nomination. The distinction between the cases is only this, that where the question is only *how* the charity shall take, it shall be regulated

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184.

* In the case of *Widmore v. The Governors of the Corporation of Queen Anne's Bounty*, 12th of December, 1766, Ambl. 637, and Highm. on Mortm. part ii, 10. Mr. *Widmore*, the testator, gave £200 to the corporation of *Queen Anne's bounty*, to augment poor livings; and directed his executors to divide the residue of his personal estate into three parts, and to pay one third either to the corporation of *Queen Anne's bounty*, or the society for propagating the gospel; another third to his most necessitous relations, by his father's and mother's side; and the third to some public charity. The legacy to the corporation of *Queen Anne's bounty* being held to be void, as, by the rules of that institution, it must be laid out in land, the third of the residue which was given to the same charity, or to the society for propagating the gospel, was ordered on the same account to be paid to the latter, and the legacy of the other third, to some public charity, was declared to be good, but that the executors ought to dispose of it under the eye of the Court, and therefore were to propose a charity to the Master (a).

[(a) Vide *Middleton v. Clithrow*, 3 Ves. 734.]

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by the Court, but not where the question is *who* shall take? In the first set of cases, they are all for *charity* generally.—The object is clear, and therefore, the mode not appearing, it devolves upon the crown. In *The Attorney-General v. Syderfen*, the object was certain, and the same in the case of the ward of *Bread-street*.

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Lord Chancellor.—It seems if this had been a private legacy, and a selection of objects out of which the legatee was to be chosen, it is allowed that it would be of the essence of the legacy, and it could not take place unless there was an expression of general favour, to let in all the objects. The cases must be considered in order to form a line of distinction. The case of *Syderfen* goes beyond all the rest, because the will of the testator is to be explained by the grant of the crown.—My notion is, that in the case of charities this Court derives a great latitude of authority, from the extensive nature of most charities; because they cannot go upon the same strict rules which prevail in private cases. But that is well resolved into the purpose and the mode. Where the testator is willing it shall go in the largest extent, you only follow his intent in marking out objects.—I wish to follow this method in construing the intent of testators. I have stated a distinction between charities and private cases, so as to lay down a latitude more wide than is to be wished to be left to courts of justice. In the *Downing College* case, the difficulty was, that, when the anterior estates were spent, there was nobody to take the equitable dominion; and the question was, whether the analogy held between it and a legal estate, with nobody to take, which descends to the heir at law, till an object arises. Even in private cases, the distinction between the object and the mode has been attended to.—I will look into the cases whether selecting one out of the objects is regulating the mode only.

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Lincoln's-Inn-Hall, 28th July, Lord Chancellor gave judgment in this case.—The question is here, whether the legacy is void, the executor's name being struck out, and there being no person upon whom it could devolve; or whether the Court will sustain it. It has been argued that the Court has great extent of jurisdiction, in making legacies certain which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been at all times an exercise of this authority, where a legacy has been doubtfully given, as in *Attorney-General v. Syderfen*, which was a legacy to such charitable uses as he had appointed, but the appointment was not found; the Court decreed the charity to be directed by the crown, as there had been an appointment. In *Wheeler v. Sheer*, in Lord King's time (Mos. 288, 501.) there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied Lord King, that the testator had not so fixed his mind as to separate the legacy from the

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the personal fund, and he would not carry the charity into execution (a). The cases have proceeded upon notions adopted from the Roman and civil law, which are very favourable to charities, that legacies given to public uses not ascertained shall be applied to some proper object. From *Swainburn*, down to Lord *Hardwicke*'s time, that would be the effect where the object is disappointed: but the present case is different. Here the testator giving a legacy to the next of kin, and to the executor, names a particular charity a residuary legatee; the question is, only, how the trust shall be carried into execution. I remember to have read a case somewhere*, where a legacy is given to B. for the benefit of non-conforming ministers, with the advice of C. and D.—At the testator's death B. C. and D. were all dead, yet the Court sustained the legacy. It must be referred to the Master, to which of the *Lying-in hospitals* it shall be paid (b).

* This is the case of *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193.

[(a) See Lord Eldon's observations in dissenting from this opinion, 7 Ves. 79. 1 Meriv. 91, 96.]

[(b) Vide *Moggridge v. Thackwell*,

post, vol. iii. p. 517. And the note at the end of it, where the subsequent cases upon the *cy-pra* doctrine are referred to.]

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11 Serj. Hill's
MSS. 501.

Bond of a feme-covert, jointly with her husband, shall bind her separate property.

HULME v. TENANT and his Wife.

A BILL filed by the obligee of a bond, to secure £180 entered into by the defendant's husband and wife; against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate. Upon the marriage the estates of the wife had been conveyed to trustees; one part consisting of freehold and leasehold lands, in trust to receive and pay the rents and profits to the wife, for her separate use, and to convey the estate itself to such use as she by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint, in default of appointment, to the use and behoof of her heirs and assigns: other parts to be sold, and out of the produce, £1,000 to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal to her, or her order by note or writing under her hand; and for want of such appointment to her executors, administrators, and assigns. This £1,000 had been raised, and the whole or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate. In 1769 the husband borrowed of the plaintiff Mrs. *Hulme* £50, upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself

herself applied to the plaintiff and borrowed £130, paid the interest due upon the former sum of £50, and gave a new bond for the £180.—The cause had been heard before Lord Bathurst, who dismissed the bill. It came on now to be re-heard.

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Mr. Mansfield opened for the plaintiff, but the reporter was absent.

Mr. Attorney-General, for the defendants. The plaintiff is not entitled to the relief of a court of equity, but is to be left to make the best she can of the security at law. Trustees for a woman, are appointed for the purpose of preventing her from doing acts prejudicial to herself, under the influence of her husband. The husband's credit not being good, the plaintiff has taken the wife's bond. The husband was indebted.—He and his wife are co-obligors, and it is done with the approbation of the plaintiff's attorney, who must know it was void.—He ought to have insisted upon a mortgage of her separate property. This Court will never look upon bonds as appointments, where the party could not enter into the bond. In many cases of bonds with penalties, the Court considers the bond as the form only, and as evidence of the substance, and will not suffer the party to be free upon payment of the penalty: but in the case of an infant, where it is voidable only, the taking of the bond will not aid the taker in equity. I do not contend that a married woman cannot contract in respect to her separate property, but the party contracting must take a security agreeable to the nature of the property—he cannot better his security. *Peacock v. Monk*, 2 Ves. 190. closes with a *dictum*, the authority of which is very doubtful; it had no affinity to the principal question.

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Mr. Selwyn (on the same side).—There is no case where the point has been determined that a bond, in which the wife joins her husband, binds her separate property. *Norton v. Turvill*, 2 P. W. 144, was against the wife's representatives, which is very different from the present against the separate property settled upon her for life.

Lord Chancellor.—*Grigby v. Cox*, 1 Ves. 517, appears to be a decree for a specific performance. The defect of that case is, that it does not state the trust. It is said, that a feme covert is to be considered as a feme sole, with respect to every authority she can exercise over her separate estate; but it is different where the consent of the trustees is made essential to the conveyance, although the mere appointment of trustees is not sufficient to deprive her of that authority; for there must be trustees, otherwise she could have no separate property.

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**Mr. Selwyn.**—\* In *Biscoe v. Kennedy*, Sir Thomas Clarke thought it was to be considered as the property of a feme sole; but, in that case, the bond was given before the marriage of the parties.

**Lord Chancellor.**—Do you consider that case as deciding that her property was liable to her acts only whilst she was a feme sole?

**Mr. Selwyn.**—A feme covert can execute no act except by virtue of a power, or with the consent of the trustees, or by some means referring to her separate property; but, in this case, there is no reference whatsoever to her separate property, or consent of trustees. It is not wholly immaterial that the plaintiff has sued at law.—In *Machorro v. Stonehouse*, in July last, upon marriage, a sum was agreed to be laid out in the funds, upon trust, that the dividends should be to the separate use of the wife; the plaintiff bought the interest during the lives of the husband and wife for eight years purchase; there was no fraud: a bill was brought against the trustee for a transfer.—Mrs. *Stonehouse*, in her answer, insisted this was against her consent, but there was evidence in the cause that they both consented.—This bill, so circumstanced, was dismissed with costs, by his Honor, who seemed shocked at the proposition, that a married woman could be bound by an act done in conjunction with her husband.

**Mr. Mansfield** (in reply).—It is now laid down that a woman having separate property, cannot dispose of it but by the means pointed out by the settlement and with the consent of her trustees. It seemed to me that a feme covert, having separate property, was to that intent a feme sole, and might borrow money and give securities. The consent of the trustees has been decided not to be

\* *Biscoe v. Kennedy*, at the Rolls, 21st July, 1762, the defendant *Jane Kennedy*, then the widow of *Ormond Tomson*, Esq. being indebted to the plaintiff *Biscoe*, in £114, by bond, 22d April, 1755, and being possessed of several leasehold houses, and of £1,000 *East India* stock, by settlement on her marriage with the defendant *James Kennedy*, all her personal estate (excepting £500 *East India* stock, which the husband was to have) was conveyed to the defendant *M'Culloch*, in trust, for the separate use of the defendant *Jane*. The marriage having taken effect, the plaintiff filed his bill (without having sued the husband) to have the separate estate of the wife applied to the payment of the debt; which bill was dismissed. The plaintiff then sued out writs against *James* and *Jane Kennedy*; but *James Kennedy* absconding could not be served, and the plaintiff proceeded to outlawry, and then filed this bill to be paid out of the wife's separate estate.—The defendant insisted, that during her husband's life her separate property was not liable to this debt, contracted by her while sole. The plaintiff contended, that the settlement was, as to him, fraudulent. Upon the hearing his Honor declared that, upon the circumstances of the case, the effects of the defendant, vested in her trustee, were to be considered as the property of a feme sole, and ordered plaintiff's debt and costs to be paid out of the £500 *East India* stock, in the hands of the trustee (a).

[ (a) See one point of this case, 2 Wils. 127.]

necessary;

necessary; the use of trustees being only to guard it against the husband. Here, it is to such uses as she by deed, or will, should appoint.—Mr. *Attorney-General* and Mr. *Selwyn* argue upon the ground that the bond was void—That is begging the question.—If we are right, though void at law, it is not void here. The latter of these two bonds, that to secure £130, was given on the mere motion of the wife. No objection arises from the plaintiff's having sued at law, it was a legal security against the husband.—As to an infant's bond:—An infant is never considered here as an adult, but a feme covert is very often considered as a feme sole. In *Norton v. Turvill* the assets were considered as being bound whilst she was living. That case is decisive of the present question. The *dictum* in *Peacock v. Monk* is mentioned as falling from Lord *Hardwicke*, and naturally, as being the general rule governing the property of women, and taking that particular case out of the rule. In *Biscoe v. Kennedy*, the separate property could not be the subject in dispute, the debts of a feme sole falling on her husband. In *Marchorro v. Stonehouse*, the woman lived separate from the husband, and probably some fraud struck the learned judge.

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*Lord Chancellor*.—My doubt arises principally upon the form of the relief, rather than the principles upon which the bill is brought; it is a bill brought by the obligee upon a joint bond by husband and wife, for £180, to recover that sum out of the separate property of the wife.—It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.—The question is, what sort of execution this Court will award against that separate property? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses, and, for want of such declaration, or appointment, to the use and behoof of the wife, her heirs and assigns; as to other parts, in trust, to be sold, and out of the produce of the sale, £1,000 to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her, or her order, by note or writing under her hand, and, for want of such appointment, to her executors, administrators, and assigns. The rule laid down in *Peacock v. Monk*, that a feme covert acting with respect to her separate property, is competent to act in all respects as if she was a feme sole, is the proper rule, and necessary to support the decisions on this subject. The consequence was that, in *Allen v. Papworth*, 1 Ves. 168, where a bill was brought by husband and wife, for an account, the wife, together with her husband,

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submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate estate were by decree directed to be so applied.—In *Grigby v. Car*, where the wife had contracted to sell her separate estate, being authorized by settlement to dispose of it, the Court bound her, as a person equally competent as if sole, to a specific performance of that contract:—I take it therefore it is impossible to say; but that a feme covert is competent to act as a feme sole, with respect to her separate property, where settled to her separate use; but the question here goes a little beyond that; it is not only how far she may act upon her separate property, I have no doubt about that; but the question is, how far her general personal engagement shall be executed out of her separate property.—If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but if she enters into an engagement, which would make a feme sole liable to the whole extent of the contract as to her person, &c. in every respect; it is clear such general engagement, entered into by a feme covert, will not bind her as such.—It is not like the case of an infant, who is incapable of acting; but, in respect to a feme covert, determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands or rents and profits, according to the exigency of justice, or of the engagement of the wife to be carried into execution. I know of no case which has gone further than that. Suppose the wife to have power by settlement to dispose of her real estate, to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case, where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and, by sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife. It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife, by the hand of the trustee, who consequently is no longer liable as to that sum, so that so far as the £1,000 it seems out of the reach of this Court; the trustee alledging that the money is paid, or not remaining in his hands.—(Mr. Ambler.—Only part paid over). Lord Chancellor.—I believe

lieve there is no instance of a personal decree against a feme covert for payment of any sum whatever.—Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it,—as a bond it is void, otherwise an extent might have gone.

*Lincoln's-Inn-Hall, 28th July. Lord Chancellor.*—I have no doubt about this principle, that, if a court of equity says a feme covert may have a separate estate, the Court will bind her to the whole extent, as to making that estate liable to her own engagements; as for instance, for payment of debts, &c. But, although the remedy here is more extensive than in a court of law; I do not find the Court has ever ordered a power to be executed; they have industriously stopped short of so doing, and have only given a remedy by stopping the fund, where the power was executed; therefore I cannot order the feme covert to execute her power; but I am exceedingly clear that the leasehold estate will be liable (a).

It stood referred to the Master to take an account of the rents and profits of the leasehold estates: but, before any report, the parties came to a compromise, upon the defendant *Frances* paying the principal sum borrowed, with interest, without any costs\*.

\* Vide *Stamford v. Marshall*, 2 Atk. 68. and *Sockett v. Wray*, post, vol. iv. p. 483.

The Reporter was not present in *Lincoln's-Inn-Hall*, on the 28th of Ju'y; for what passed upon that day in this and the two former causes, he is obliged to the information of friends, upon whose accuracy he can depend.

[(a) Vide *Duke of Bolton v. Williams*, post, vol. iv. 297. 2 Ves. jun. 138. *Sperling v. Rochford*, 8 Ves. 175. *Nantes v. Corrock*, 9 Ves. 182. *Jones v. Harris*, ibid. 486. *Heatly v. Thomas*, 15 Ves. 596. *Bulpin v. Clark*, 17 Ves. 365, and Mr. *Clancy's* elaborate discussion of this case, in his *Essay on the Equitable Rights of married Women*. Vide also the cases cited in *Pybus v. Smith*, post, vol. iii. 346. *Fettiplace v. Gorges*, ib. 8. 1 Ves. jun. 46. and *Sockett v. Wray*, vol. iv. 483. This

question was lately much discussed in the case of *Greatley v. Noble*, 3 Madd. 79. before Sir *John Leach*. Though it was not necessary to determine the general point, his Honour on that occasion and in the subsequent case of *Stuart v. Lady Kirkwall*, cited ib. n. expressed his opinion that the separate estate of a feme covert could not be reached, without some charge on her part, either express or to be implied.]

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## MICHAELMAS TERM.

19 GEO. III. 1778.

## STEPHENS v. LORD VISCOUNT BATEMAN (b).

A deed entered into by parties apprised of their rights, in order to put an end to a suit, although upon inadequate consideration, shall not be set aside.

**T**HIS bill was filed to set aside a deed entered into by the parties in 1760, under the following circumstances. By settlements made in the *Western* family, in the years 1712, and 1722, terms were created for raising portions for daughters, (£12,000,) which, had the real uses subsisted, and no act intervened, would have vested in the plaintiff Mrs. *Stephens*, and [the defendant] (a) Mrs. *Hanbury*. Before Mrs. *Stephens* became of the age of sixteen, she went off with and married one *Dumesnil*, a *French* servant of [her father's] (b). All the real uses under the settlement failed in 1730, and the fee-simple then descended on Mrs. *Stephens*, and her sister Mrs. *Hanbury*, subject to the life estate of the mother, then Mrs. *Dollet*. In 1741, Mrs. *Stephens* came of age: no act was done by her during the life of *Dumesnil*, and, he being dead, she in the year 1758, married *Stephens*, and levied fines, and settled the moiety of the estate to the use of herself and her husband, for their respective lives; remainder to the issue of the marriage, remainder to the husband in fee. After this, questions arising in the family as to what forfeiture Mrs. *Stephens* had incurred, under the fourth and fifth of *Philip and Mary*, cap. 8. by assenting to the marriage with *Dumesnil*, an ejectment was brought to try the question, a trial was had, and a case reserved for the opinion of the Court; but in the mean time Mr. and Mrs. *Stephens*, being poor and in debt, the parties came to the agreement, and entered into the deed in question. By this deed it was recited, that questions had arisen, that Mrs. *Stephens* insisted the forfeiture was at an end by the death of *Dumesnil*, and that Mrs. *Hanbury* insisted that it subsisted during the life of Mrs. *Stephens*; Mrs. *Stephens*'s moiety of the estate was then conveyed to the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder in fee to Mrs. *Hanbury*.—By this deed £2,000 were to be raised, to discharge the debts of Mrs. *Stephens* and her husband. It was executed by Mr. and Mrs. *Hanbury*, Mr. and Mrs. *Stephens*, and Mrs. *Dollet* the mother, and at the time there was no

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(b) Vide Lord *Hardwicke*'s observations at the conclusion of his decree in *Pullen v. Ready*, 2 Atk. 592. and as to family arrangements, vide *Kinchant v. Kinchant*, post, 369.

[(a) Should be "her sister," as Mrs. *H.* was dead some years before the suit was commenced. (Serj. *Hill*.)]

[(b) "Her uncle Lord *Bateman*." (Serj. *Hill*.)]

probability

probability of issue of Mr. and Mrs. *Stephens*. The bill now filed was to set aside this deed, as obtained by surprise from persons in necessitous circumstances, and that the £6,000 portion should be raised.

The Reporter did not hear the opening for the plaintiffs.

Mr. *Mansfield* for the defendants.—This deed has been impeached upon various grounds, as very hard upon Mrs. *Stephens*; but the hardship, if any, was upon Mr. *Stephens*.—Secondly, It is said to be founded upon a mistake, for that the forfeiture was at an end, by the death of *Dumesnil*. But the deed was not founded on the forfeiture, but upon the doubt; and an ejectment had been brought to try the question. Had it been founded upon the forfeiture, there would not have been much doubt about it; the simple point under the *stat. 4 and 5 Philip and Mary, c. 8.* is whether the forfeiture is for the life of the husband only, or for that of the wife also.

Lord Chancellor.—Was not the whole question, whether he had taken her away? For although the husband has confessed it, that confession cannot bind her.

Mr. *Mansfield*.—There can be no doubt upon the construction of the statute; the words are “if any woman child, or maiden, being above the age of twelve years, and under the age of sixteen years, do at any time consent or agree to such person that so shall make any such contract of matrimony, contrary to the form and effect of this statute, that then the next of the kin of the same woman child, or maid, to whom the inheritance should descend, return, or come after the decease of the same woman child, and maid, shall, from the time of such assent and agreement, have, hold, and enjoy all such lands, tenements, and hereditaments, as the same woman child and maiden had in possession, reversion, or remainder, at the time of such assent and agreement, during the life of such person that shall so contract matrimony: And after the decease of such person so contracting matrimony, that then the said lands, tenements, and hereditaments, shall descend, revert, remain, and come to such person or persons as they should have done in case this act had never been made, other than to him only that so shall contract matrimony;” here the forfeiture commences on the consent. It is impossible to give any sense to the words of the statute, if the forfeiture is to be for the life of the husband only; for it would then be, that, after the death of the husband, the estate should go to any person to whom it should have gone, except the husband. This is not a new point; it has been determined in *Radcliffe’s case*, (3 Co. 39. 2d point) that the statute “imposes forfeiture as well on him who takes, &c. as on the damsel, if she exceeds the age of twelve years, if she assents to such contract, by forfeiture of her

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“her land during her life,” also 3 Inst. 62. So that, had the deed been grounded on the forfeiture, there would have been no mistake.—Then the forfeiture is said not to extend to reversions: but the very words of the statute are, “in possession, reversion, or “remainder.”—As to there having been no conviction, the forfeiture was brought on by the assent of the wife who could not be convicted. *Radcliffe’s* case excludes the necessity of a conviction. But the deed proceeded upon a doubtful construction. This is the first attempt to set aside a deed so founded long after it was made. The unsettled estate was forfeited as well as the settled. The fines were levied of all the estates, there is no doubt but they meant to settle them all.—The next question is as to the £6,000. It is contended, this is to remain as a subsisting charge. The term was created in 1712; but in 1741, Mrs. *Stephens* and Mrs. *Hanbury* became seised in fee, and there is no act done which shews that this charge was considered as subsisting. Mrs. *Stephens*, during *Dumesnil’s* life, could never make use of the whole estate.

*Lord Chancellor.*—The portion was not raiseable during the life of the mother.

*Mr. Mansfield.*—No.—Then as to her own moiety, she might have made use of that as a mere trust term, to attend the inheritance, although it was not assigned. There is no case where such a term has been made use of by a tenant in fee when the person was of age; which puts *Thomas v. Kemysh*, 2 Vern. 348. out of the case. In the *Duke of Chandos v. Talbot*, 2 P. W. 601. there was an estate-tail only, the Court thought it would have merged had it been an estate in fee (c). This £6,000 does not depend upon the doctrine of *Graham v. Londonderry*, in 3 Atk. 393, which turned upon a younger son becoming an eldest. Mr. and Mrs. *Stephens* have put an end to the term by their own act in levying the fine in 1758, which is made still stronger by the deed of 1760. A fine will bar not only present but future interests: and in the *Duke of Chandos v. Talbot*, it was held, that fines and recoveries will bar claims in equity, the same as claims at law. As to the copyholds, it does seem that the parties have proceeded upon a supposition that they were not forfeited.—The general rule is, that acts of parliament extend to copyholds, where their so extending will be no detriment to the lord; therefore, if the copyholds were to pass without admission, that circumstance would make the act not include them, but if the act only goes to compel admission of the party next entitled, it may extend to copyholds.

(c) Vide *Chester v. Willes*, Amb. 246. and *Donisthorpe v. Porter*, ibid. 600, [2 Eden, 162.] *Rushout v. Rushout*, 3 Bro. P. C. 133. (a)

[(a) See also *Price v. Gibson*, 2 Eden, Amb. 753. *Forbes v. Moffatt*, 13 Ves, 115. *Wyndham v. Earl of Egremont*, 384, and the cases there cited.]

This

This distinction is laid down in *Heydon's case*, 3 Rep. 8. but there is no need here to make any decree with respect to the copyholds, the *Hanburys* having been in possession of them many years.

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Mr. *Madocks* (on the same side) cited *Best v. Stampford*, Prec. Ch. 252. to prove that where the estate and the term came into the same hand, the term merged, and Prec. Ch. 333. that a wife joining in a fine barred her lieu upon the land.

Mr. *Attorney-General* (in reply,) Mrs. *Stephens* was owner in fee of the estate, and entitled to the £6,000, then under the doctrine of *Thomas v. Kemys*, she might at any time have conveyed the £6,000 to any person who had supplied her with money. Suppose there was a forfeiture during her life, it could not forfeit the reversion, or the £6,000. Had the *Stephenses* known their rights, their interest would have produced them more money than they wanted;—but by the deed they have got only an interest for their lives, commencing upon the death of the mother. Their immediate income was not increased, they only got £2,000 to pay their debts, which is much less than any body would have advanced them: The deed therefore could only be entered into from the distress of their circumstances. The only question as to the £6,000, is, whether the deed can effect it.—It was not in contemplation at the time. Though a recovery will bar collateral rights, it must be intended so to do at the time.

*Lord Chancellor*.—The first question is, whether this is a fair deed, and whether it is possible to contend that the term was independent of the estate, and Mrs. *Stephens* can call upon the trustees to raise her portion. Either considering this as a merger, or without taking the doctrine of merger into consideration, it appears to me that it is impossible to set up a term against such a conveyance. This money would not have gone to executors or administrators, which shews that it substantially unites with the land. Then the question is, whether there is sufficient ground to set aside the deed. It is manifest it was a hard bargain, but only as far as it affects *Stephens*, who, having, under the former deed, an estate for life with a fee expectant, and there being no expectation of issue, has parted with his fee-simple expectant for a very small consideration. But is that a ground to set aside the conveyance?—No.—The cases are express that the Court will not set aside the conveyance on that ground only. Undoubtedly, till the year 1760, the *Stephenses* were kept out of possession. In 1760, there was a suit brought to try the question, whether the possession of the *Hanburys* was available. There was a trial and a case reserved, and thereupon they came to the agreement. It is impossible to state any gross surprise. There is no doubt the bargain

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is unequal; but the whole is reduced to this, that the parties being apprised what they were about, and having advised with counsel, have made a bargain which now appears unequal (a).

*Bill dismissed.*

[(a) As to the inadequacy of consideration, vide the cases cited ante, p. 11. As to agreements entered into by parties uninformed of their rights, vide *Evans v. Llewellyn*, post, vol. ii. 150.]

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## HILARY TERM.

19 GEO. III. 1779.

(d) HOARE v. CONTENCIN and others.

Where an original right is merely of legal jurisdiction, the death or bankruptcy of parties will not support a bill in equity.

THE defendants, being concerned in a speculation in tea, borrowed, by *Layton* their broker, a very large sum of money of the plaintiffs the bankers, upon the credit of the *East-India* company's warrants; afterwards the teas selling at loss, and their produce not amounting to the sum borrowed upon the warrants; the plaintiffs filed their bill against all the parties on whose account the loan was negotiated, for payment of the deficiency, contending that they were bound (though not named) by the act of their broker, and stating the whole as a partnership transaction. Only two of the persons originally concerned, viz. *Dawes* and *Shuttleworth*, were now alive and solvent; *Roger Staples* died pending the suit which was revived against his representatives; *Contencin* was become bankrupt, and his assignees were brought before the Court. It was objected by Mr. *Attorney-General*, on the part of the defendants, that this was matter merely at law; and that the plaintiffs ought, upon their own stating of the matter as a partnership transaction, to have brought their action against *Dawes* and *Shuttleworth*, the two surviving and solvent partners, who were liable to the whole demand.

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Mr. *Madocks*, for the plaintiffs, contended that the bill was well brought, and cited *Holstcomb v. Rivers*, 1 Eq. Ab. 5. tit. Account, (1 Ch. Ca. 127.) and that, in the case of obligor and surety in a bond, this Court would entertain a bill against the representatives of an obligor, though an action lay against the surety. He cited *Borton v. Snee*, 1 Ves. 154, that principals, though not named, are bound by the contract of their broker. The Court will order an account to be taken of the assets of the principal who is dead, and, if they are not sufficient to pay his quota, will give the plaintiffs a re-

(d) Vide *Taylor v. Crompton*, Bunb. Rep. 93.

medy

remedy against the several surviving principals. The case made by the bill proves the amount to which the parties are liable. At law they would be jointly liable. The remedy will be to direct the plaintiffs to prove under the commission of bankruptcy, and that there be an account, of the assets of the dead person, and of the shares of those alive and solvent; and if there be any deficiencies from the dividends of the bankrupt's estate, or the assets of the dead party, then the plaintiff shall have a remedy for so much against the surviving solvent parties. Then, will the Court say you shall only have a remedy at law against the solvent parties? The Court will prevent a circuitry of actions: The consequence of our recovering at law against *Dawes* and *Shuttleworth*, the solvent parties, would be, that they must come into this Court, to recover against the assignees of the bankrupt, and the representatives of the dead party. There is another reason why this bill should not be dismissed, that an account is prayed, and must be taken, of the interest of the money lent by the *Hoares*, and they must account for what has been produced by the tea warrants. Then, the question is whether the bill should be retained, with leave to bring an action, or an issue should be directed. This depends upon the right to be ascertained. Where the fact is admitted, and the law only in question, the Court directs a case: If both fact and law are in doubt, then either an issue or an action. Then, which will be most expedient in this case? In an action, the representatives of the dead party, and the assignees of the bankrupt, will not be bound; the action can only be against the survivors, it will not be maintainable against the representatives. In an issue, they will all be bound. Where it is necessary to come to this Court, and the Court can determine the matter, it will. *Parker v. Deq*, 2 Ch. Ca. 200.

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Mr. *Walker* (on the same side): to shew that this Court would entertain bills to prevent circuitry of actions, cited *Dolphin v. Haynes*, Show. P. C. 17. Eq. Ab. 79, pl. 3. S. C. and 3 Atk. 406, *Madox v. Jackson*.

Lord Chancellor.—It is of great consequence that it should be understood what are the bounds between the jurisdiction of courts of law, and courts of equity, because otherwise much difficulty will arise from parties being put to a great expence, to try here what should be tried at law; and, what is worse, a party would be permitted to go on here for legal consequences, although the Court must send it to law, to try the legal right. The question is, whether this case differs an *iota* from the common case of an action at law. What do you desire? distribution? do you not contend that you have a right against all, and each of the parties? Here all the equity, is, that if one party cannot pay the other shall; the question is merely between the defendants. Can the plaintiff bring all the parties

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parties before the Court, to try the right between them, when he has nothing of his own to try? It is true that, where he has an equitable demand, the plaintiff must bring all the parties interested before the Court. This bill is only filed against eight persons, for a remedy for money lent upon a joint contract.—If they stood as they originally did, it is not argued, that a bill would lie against all of them. As to an account, this is only of a repayment of money, and that the money for which the teas sold shall be deducted.—As it stood originally, therefore, the bill could not have been supported. I think the circumstance of one of the parties having died since the bill was brought has no effect upon the case: for although where the bill originally states a demand competent to the jurisdiction, and parties die pending the suit, the Court will decree an account of assets against the representatives; yet, where the original demand is incompetent, the mere death of parties shall not support a revivor of that bill, although a subsequent equity which arises from that circumstance might be a ground of application here.—I have looked into all the cases, and they are totally different from that before the Court; and I find still greater difficulty to discover a principle, that the plaintiff can come here merely because a party is dead, by which the action is extinguished against him, and survives only against the rest. The cases are—*Bishop v. Church*, 2 Ves. 100, 371. and *Jacomb v. Harwood*, 2 Ves. 265. The whole question in *Bishop v. Church*, was whether, the remedy being extinguished at law by the form of the contract, the party should have a remedy here. Lord *Hardwicke* expressed an idea, that, as it was a partnership transaction in trade, there must be a remedy against either. It stood over upon another point, that he lost it by his own laches; but upon the examination of *Clive*, it proved that the executors had acknowledged it to be their debt. Lord *Hardwicke* finally determined it on the ground that both having undertaken in equity, if the plaintiff could not recover against one, he should against the other. That is very different from this case, because here is no danger of the debt being lost, there being a full remedy against the survivors. *Jacomb v. Harwood* is not an authority in this case. In that mentioned from the Court of *Exchequer*, (*Allport v. Thomas*, Gilb. Eq. Rep. 227.) an action at law would certainly have lain, but the particular point was not argued: the ship had been sold, the money arising by the sale had, probably, been deposited, which might, or might not have been the cause of the suit. The case in *Atkyns* (*Madox v. Jackson*) has nothing to do with it, it is the case of a joint and several bond. If the party was competent to stand in Court at all, he should have brought the other parties into Court.—In this case, there is no circuitry of suits, for if the plaintiff had recovered against the surviving parties, see what would have been saved: the question of fact, whether there was a partnership transaction would have been settled before the other parties could have been called upon for

for contribution: it would have been tried at the expence of about £100; here is an immense quantity of pleadings and depositions, and an enormous expence, to bring in question a demand which is merely at law.

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*Bill dismissed with costs.*

An action was afterwards brought against *Dawes*, and tried at *Guildhall*, 3d March, 1780, when a verdict was given for the defendant; and, a motion being made for a new trial, it was upon argument discharged. Dougl. 356 (a).

[(a) The determination in this case is extremely questionable. It will be found to be in contradiction to most of the prior cases as they are collected and considered (1 Meriv. 545. et seq.) to have been much shaken by subsequent decisions, and to have been expressly doubted by Lord Eldon. His Lordship, 17 Ves. 525, has stated the modern doctrine to be, that where a man has chosen to take the joint credit of several, though at law, his security is wearing out as each of his debtors

dies; yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a Court of Equity will, under certain modifications, constitute that demand, vide *Stevens v. Praed*, 2 Ves. jun. 523. *Daniel v. Cross*, 3 Ves. 279. *Stephenson v. Chiswell*, ib. 569. *Gray v. Chiswell*, 9 Ves. 118. Ex parte *Kendal*, 17 Ves. 520. 1 Rose, 71. *Deraynes v. Noble*, (*Sleech's case*), 1 Meriv. 539.]

### GARTH v. MEYRICK.

TWO legacies of £1,000 each were given in the same will to the same legatee; the first bequest was, "I give to ——— (the legatee), £1,000 old *South-sea* annuities, to be transferred into her own name;—and then toward the close of the will, I give to ——— (the legatee) £1,000 old *South-sea* annuities, as aforesaid." It was endeavoured to support these as separate legacies, and that the legatee should take both; but not allowed\*. Secondly, the testator left the residue to his six grand-children, by their christian names, but the name of *Ann* was repeated, and that of *Elizabeth* another grand-child omitted; but it was decreed in favour of all the grand-children, and that *Ann* took but one share, and *Elizabeth* should be admitted to the share mistakenly given to *Ann*, by the repetition of her name (a).

Two equal legacies in the same will, and to the same legatee, only one shall pass.

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Residue to six grand-children, the name of one repeated that of another omitted, they shall all take.

\* In the case of *Greenwood v. Greenwood*, before Lord Bathurst, 25th Jan. 1776, *Hester Joyce*, by will dated 20th Feb. 1773, gave "to her niece *Mary Cook*, wife of *John Cook* £500," and afterwards in the same will, among many other legacies, "to her cousin *Mary Cook* £500 for her own use and disposing, notwithstanding her coverture;" his Lordship declared, that *Mary Cook* was entitled to one legacy, only, of £500, and that the same was for her separate use. The cause was reheard upon this point, 16th Dec. in the same year, and the decree affirmed. As to the effect of such double legacy in a will and codicil, see the case of *Ridges v. Morrison*, post, 389, and *Hooley v. Hatton*, there cited and relied upon. Vide *Barclay v. Wainwright*, 3 Ves. 462. and *Holdford v. Wood*, 4 Ves. 76.

S. C.  
 10 Serj. Hill's  
 MSS. 437.

[(a) Vide *Del Mare v. Rebello*, post, vol. iii. 246, and the cases cited in the note.]

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## GREEN v. HOWARD.

A legacy of personal estate to testator's wife for life, and after her decease to the testator's relations, who shall be then alive, confined to relations within the statute of distribution.

**A** PETITION by two persons of the name of *Hudson*, to be admitted to shares of £4,000 under the following circumstances: the testator had left this legacy(e). "I give £4,000 to my wife for her life, and after her decease to my own relations who shall be then alive." There were several legacies in the will, to both first and second cousins. The petitioners were second cousins to the testator, and now petitioned to be admitted to shares with the next of kin.

Mr. *Ambler* for the petitioners.—In *Jones v. Beal*, 2 Vern. 381. the Court would not restrain the devise, by the statute of distribution. The testator appears to have had an equal regard for the second cousins to that he had for the first, and meant to extend his bounty beyond the next of kin. It is in evidence, that he used to receive the second cousins with equal kindness as the first. If the terms used carry any decisive meaning, they are more extensive than next of kin. Wherever there is a doubt about the construction of a will, the Court will admit evidence of circumstances. 1 P. W. 144. *Lady Granville* against the Duchess of *Beaufort*. As where persons are improperly described, not only where there are two persons of the name of *J. S.* but even where there is a total mistake of the name. 2 P. W. 141. *Beaumont v. Fell*.—So in *Deerhurst v. Sweeting*, 1753, where the testator had two sons, and gave to *John* by the name of *James*, evidence admitted to prove he used to call him *James*,—also in *Bridall v. Harper*.

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Lord Chancellor.—Is there one case where the word *relations* has been held to mean more than *next of kin*?


Mr. *Madocks*, on the same side.—If the testator has marked an intent to carry it further than the statute of distribution, the Court will do so: the statute of distribution is only adopted by the Court from necessity\*. He uses the word *cousin* indiscriminately in the will, for first or second cousins; and *cousin* is a name of relationship. Where the legacy is to vest at the death of the testator the

(e) The devise, as it appears in the will from the statement of the case in the Register's book, is, as follows: "And as to the other moiety of the said principal sum of £4,500 I give the same to and amongst such of my own relations as at my wife's death shall be living, equally to be divided amongst them, share and share alike. Reg. Lib. A. 1777, fol. 233.

\* Upon this principle was the decision in the case of General *Honeywood's* will, mentioned afterwards by Mr. *Scott*, and that in *Greenwood v. Greenwood*, (cited ante, p. 30, n.) when it came on for further directions, 14th April, 1779, where *Hester Joyce*, by a codicil gave the residue to be divided between her relations, that is, the *Greenwoods*, the *Everits*, and the *Dows*. The *Everits* were not within the degree of relationship limited by the statute, but were deemed to take jointly with the *Greenwoods* and *Dows*, who were.

statute

statute applies, but where it is deferred to a remote period, it does not. Suppose the testator left a first cousin, and the child of the first cousin; if the parent died in the life-time of the tenant for life, the representative would not take, because the condition precedent did not take place.

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*Lord Chancellor.*—That, under all the determinations, would be a lapsed legacy.

*Mr. Scott, on the same side.*—Upon the construction of confining it to the statute, this would be making a will merely to die intestate. There is a difference where there is a wife, because the wife would not take under such a devise; but here it would be a pure intestacy. As to the evidence of his treatment of the cousins being admissible, I have no case; patent ambiguities are not to be helped by averments, but evidence may be given of facts, *dehors* the will, which, by words in the will, appear to have been in the contemplation of the testator.—This is founded in reason. The value of an estate is *dehors* the will: but if the testator refers to it, the evidence of it is admissible\*. This seems to introduce the number and age of the cousins, for he seems in another part of his will to refer to the probability of there being enough of them to exhaust a fund of £2,500 which he gives to his wife, to be distributed, by her, among his own relations, in shares of no more than £250 each; he must therefore expect there would be ten alive.—There were fifteen at the time of his making his will, of whom five only have survived his wife. He seems to have meant persons to take, more numerous than his next of kin. The case of *Honeywood's* will, shews that the Court will effectuate such an intention, though more remote; there the words were, “to my “relations, however distant, who shall claim within two years.”

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*Lord Chancellor.*—It would be very difficult to draw a line in favour of the second cousins against those who are more remote. If you once go beyond the statute, it must extend to every person who can make any claim. It must be confined to the statute, that is, to one class under it, for the wife cannot claim, the statute providing for her by the name of wife; therefore, such a will is not totally inofficious, for it shuts out the wife. When first these cases came before the Court, the Court said, that to avoid inconvenience, the best way was to adhere to the statute. Probably the first cases were, where the testators, having exhausted the persons whom they meant as objects, intended the rest for those to whom the law would give it. The Court has said in the same moment, that the claimants shall not always take in the proportions of the statute, but as the testator had directed; as, where there have been brothers and brother's sons, these last took not by representation,

\* As to this point see the case of *Femmeress v. Poyntz*, post, 472.

but



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but *per capita*. So where the testator has said, to relations *according to their greater need*, the Court has shewn particular favour to one. Here the testator certainly knew that the word *relations* signified more than *next of kin*. The evidence, if admitted, could go no further than to shew that he knew this. The sense of the words, as fixed by legal authority, is not to be altered by the language held on any occasion by the testator, or by his behaviour. There is no particularity in this will to alter the sense of the word *relations*. It must be among those entitled under the statute. *Thomas v. Hole*, is a stronger case than this; as it is reported in *Forr.* (251), the bequest was *to all the relations*\* (b).

*Petition dismissed.*

\* In the case of *Widmore v. The Corporation of Queen Anne's Bounty*, cited ante, p. 31, n. one of the questions was as to the third part of the residue, which was given to the testator's most necessitous relations, by his father's and mother's side; the plaintiff, *Mury Woodroffe*, was the nearest relation on the father's side (his brother's daughter) and related also on the mother's, but not so nearly as two of the defendants. Lord Camden held himself bound by the statute of distributions, and decreed that third part to the plaintiff, excluding the persons more distant. Vide *Amb.* 70, 507, 595, 636 (a).

[(a) Vide also *Maitland v. Adair*, 3 Ves. 231. *Mellish v. Devisme*, 5 Ves. 529. *Cruwys v. Coleman*, 9 Ves. 323.] [(b) Vide *Pierson v. Garnet*, post, vol. ii. 38, and the cases there referred to.]

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JAMESON v. SKIPWITH and others.

Bill filed by a tutor, for an annuity of £200, for his own life, against the executors of the pupil, supported by letters referring to an annuity, (but without any specific length of time named) dismissed without costs.

A BILL filed by the plaintiff, as a creditor, against the defendants, the executors of the late *Godfrey Bagnal Clark*, Esq. for an annuity of £200 for the plaintiff's life; Mr. Clark, having by his will charged his estate with all his "*debts by bond, mortgage, or simple contract.*" The case upon evidence appeared thus: the plaintiff, in 1753, was retained by *Godfrey Clark*, the father of the testator, as a tutor to his son, then at *Paris*, at a salary of 100 guineas a year (though this salary was frequently in arrear), and had his board and entertainment in Mr. Clark's house, when in *England*, or wherever Mr. Clark, jun. his pupil resided. This continued till 1763. In 1763, after *Clark*, jun. came of age, Mr. Jameson travelled with him into *Italy*, and continued to attend him till 1767; instead of 100 guineas a year, he had now £200 in this manner; the father (who was tenant for life, remainder in fee to the son) made the son an allowance of £1000 a year, but it was understood between them and by the plaintiff, that £200 of that sum was for the plaintiff. During the time they were abroad *Clark*, jun. ran £500 in debt to *Jameson*, for arrears of the £200, and 21st June, 1766, gave him a note for that money, and from 1767, the salary was again paid by the father. In 1768, and at various

various subsequent times, several letters were written, both by the father and son, in which it was said *the security was preparing to be executed by the father and son*, and several other references were made to the annuity. Afterwards the father took an account of the arrears due upon both annuities, and of money due upon a bond he had before given for arrears, and money lent to him by the plaintiff.—Several accounts were afterwards made out by the father from time to time, after *Jameson* had quitted the family, in which credit was given him for sums due upon this annuity. *March 30, 1774, Godfrey Clark* the father died. After his death, *Clark* the son paid two quarterly payments (which were due before the father's death) of the £200 a year, and in *November, 1774*, an account was taken of the arrears of both annuities, and of his £500 note; amounting to £2,400 for which he gave the plaintiff a bond, dated *9th December*, in that year. *December 26, 1774, Godfrey Bagnal Clark* died, having made a short will containing the charge in question.

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Mr. *Attorney-General* for the plaintiff:—'The question is, whether the plaintiff can make out a claim in equity as a creditor upon good consideration against the estate? By the statute of *Eliz.* a good and valuable consideration must be such a consideration as has a value and measure in money; but, where there is no competition with creditors, and the demand is against the parties themselves, a meritorious consideration is sufficient. The plaintiff's time and attention would be a sufficient consideration in a deed, not to make it *nudum pactum*. In the letters they acknowledge that consideration; the mode of rewarding it they settled at £200 a year, and, when he did not receive the money, they made up the account and gave him a bond carrying interest, and the son gave a note for the £500. If it is said there is no proof that it was to be for the life of the preceptor. It must be so, for what the father and son could grant.—Why give a charge, unless it was for his life? they might pay without, during their own lives, and therefore must mean that it should bind successors. In this Court, I do not say it could stand, if we were in competition with creditors; but when they are paid, the next class of demands are those upon good consideration, though not valuable in the sense of the statute: and this especially against volunteers. In *Dr. Young's* case, upon the Duke of *Wharton's* estate—(*Stiles v. The Attorney-General*, 2 Atk. 152.) *Dr. Young* had a bond from the Duke of *Wharton*, for his attendance upon him whilst abroad, and, the estate being forfeited, the Crown granted it to *Lady Jane Cook*, the duke's sister, charged with the duke's debts. Lord *Hardwicke* said, in determining upon *Dr. Young's* claim, that there was nothing in it to make it strictly a debt, and that the estate was liable only to valuable debts; that it was upon very good consideration, but he would not allow a creditor, upon mere good consideration, to

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come

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come in competition with creditors for valuable consideration : but reserved the consideration of the doctor's claim till the account was taken ; and then, there being a surplus, he was paid.—In the case of *Lady Mary Herbert v. Earl Powis*, April, 1776, 6 Bro. P. C. 102, several of the considerations were not of any kind of value, and could not be estimated in money, and therefore would not have given her any rank as a creditor.

*Lord Chancellor*.—Did not the House of Lords take some of those considerations to be valuable ?

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*Mr. Ambler* for the defendants :—The letters amount to no more than that the father had an idea of giving the plaintiff an annuity, but indefinitely. The payment does not amount to a promise. All that passed, as to preparing the security, was in the life-time of the father. The whole does not amount to such a promise as either a Court of law or this Court could compel them to perform ; it is merely an intention, not an actual agreement. The performance of a promise cannot be compelled at law without some consideration. This Court has frequently refused to perform voluntary agreements, even where steps have been taken towards putting them in execution. 1 Ch. Ca. 302. In *Dr. Young's* case there was a bond. A voluntary bond, or note so given, should be postponed to all debts. The case of *Lady Mary Herbert* had very meritorious considerations. Here it is too uncertain for the Court to say what duration the annuity was to have ; it is quite sufficient to say the *Clarks* meant it for their own lives. In 1774, *Godfrey Bagnal Clark's* will was made ; that was a proper time to have given the annuity, which was not necessary to be done by deed,—he gave by his will an annuity of £400 to his brother, and of £25 to a servant, and then charged the estate with his debts. Here was no contract, no consideration, it is uncertain, and not sufficient to bind the real estate.

*Mr. Price* (on the same side).—There are two grounds laid in the bill, neither of which is proved : first, that the engagement was, at first, made by the plaintiff in hopes of a permanent provision ; secondly, that he had refused other engagements. This is stripped of every circumstance that has been relied upon in other cases. A court of equity must have certain precise grounds for carrying any thing into execution. In all the receipts, it is treated as a yearly payment, a mere yearly bounty at the will of the giver. *Lady Mary Herbert's* case was solely this : she was entitled, as eldest daughter, to administration to her father the Marquis of *Powis* ; *Earl Powis* obtained administration, and there was a promise that, if she would renounce, the terms should take place. There was also a dispute about the guardianship of her niece, whom *Lord Powis* wanted to marry, and *Lady Mary* procured  
Lady

*Lady Herbert, of Cherbury*, to be appointed guardian, by whose consent the match took place. These were the considerations\*. It is impossible to conceive the *Clarks* thought of a permanent provision for *Jameson*.

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*Mr. Mansfield* (on the same side).—The first question is, whether here is any debt, any engagement to pay to the plaintiff an annuity for his life?—No such engagement appears by the letters, nor by whom it was to be paid, only that the son was to speak to the steward about a charge, but to, or by whom, does not appear. It is enough that there is nothing certain, or fixed, in evidence. It was merely to be a reward for past services; then it is *nudum pactum* and would not support an action, much less such a claim as this. It is not very accurate to state that a consideration which would be sufficient in a deed would be so here.—Considerations are not necessary to deeds, if there is no bad consideration to vitiate them, as in *Cray v. Rooke*, (For. 153.) This is the only view in which considerations are important in deeds. Past services are not a consideration at law, nor in this Court. Your Lordship will not convert such a consideration as this into a debt, and charge the lands with it under this will.

*Mr. Madocks* (for the trustees).—Where the party lies by, and does not make his claim in the life-time of the person by whom the contract should be performed, equity will not afterwards assist him. This is not an agreement to charge the estate either by the father or the son, nor is it so stated in the bill. It is a claim of an *assumpsit* on a promise that the plaintiff should have an annuity for his life, and the fact of payment is all from which the Court is to infer the contract. It is a mere personal promise, either from the father or the son.

*Mr. Attorney-General* in reply.—We are not praying a remedy against creditors for valuable consideration, but only the execution of a trust, created by the will of *Godfrey Bagnal Clark*, for the payment of all his just debts, whether by simple contract or otherwise, and against volunteers who take under the same will. We are not contending that this could be enforced at law against *Clark*, but that it is what he understood as a debt. *Dr. Young's* case fully founds me in this distinction. It was a bond purely voluntary, for a good, but not valuable consideration. Lord *Hardwicke* laid down the distinction between debts for valuable consideration and just debts, and that, after debts on valuable con-

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\* There were also other considerations in that case, such as *Lady Mary* declining the place of *dame de' honneur* to the Queen of *France* (which she had solicited), upon the Earl's promise to pay the annuity.—See the case at large, 6 Bro. P. C. 102 (a).

[ (a) Ed. Toml. vol. i. p. 255.]

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siderations, those ought to be considered which were upon honorable considerations, and which a man ought to pay, though he could not be compelled. It is material that this annuity come out of the son's allowance. The father was only a tenant for life, and so meant to make it a family debt. Upon altering that method a security was thought of—to be entered into by whom? by both—they both must join in order to do it.

*Lord Chancellor.*—The words of the charge are, “all my debts by mortgage, bond, or simple contract.” In 1753, it would have been a claim only against the estate of *Godfrey Clark*: and it would be impossible to say, that there was any engagement for valuable consideration with *Godfrey Clark*. Had the plaintiff, when he came into the service, stipulated for the two payments, it would have been a valuable consideration, but it would have affected the father's estate; from whence it could not be received, for the estate is deficient. On the part of the son, there is no evidence to prove any agreement, or what the annuity was to be.—Every part of valuable consideration, and every form of stipulation, seems to be wanting. No bond is given by the son for the annuity, therefore it is not to be contended, that it could be recovered against the son, or his heir adversely. If a bond is given *pro turpi causa*, or which is subject to be rescinded, the bond is no security, but if it is given gratuitously, it may be recovered at law: in this Court it will be postponed to creditors, but at law, there is no such defence. This Court postpones the gratuitous bond, it repels it from its rank, from its not having a valuable consideration, but the Court has never raised an act to an higher rank on account of its consideration. If the grant in the Duke of *Wharton's* case had been in the words of this will, voluntary bonds might have been recovered. The question is, whether this is a debt by mortgage, bond, or simple contract; it is totally impossible in a legal sense that it should be either; the outside that can be made of it is, that there was an intent to carry on the payment to the death of *Jameson*. I suspect there was such an intention, but it is impossible to gather it farther than as a suspicion,—there is not enough in the correspondence to be called proof. The bill must be dismissed, as not having made out the intention of the son, by the words, to charge the estate with any debts, but mortgage, bonds, or simple contracts; or that it was his intention to charge the estate with £200 *per annum* for *Jameson's* life.

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*Bill dismissed without costs.*

Decree affirmed in the House of Lords, 14th March, 1780(a).

[ (a) 1 Bro. P. C. ed. Toml. 376.]

PRATT

PRATT v. TESSIER.

1779.

**T**HE plaintiff having filed his bill for a discovery, the defendant put in his answer, to which the plaintiff took a great number of exceptions. These being referred to Master *Pechell*, he, thinking them all frivolous, reported the answer sufficient. Upon this the plaintiff amended his bill, by striking out the whole charging part and the interrogatories grounded upon it; and, upon the answer coming in to this amended bill, the plaintiff took seventy exceptions to this answer.

Lincoln's Inn  
Hall, 1st Seal be-  
fore Easter Term.

Exceptions to an-  
swer,—the an-  
swer reported suf-  
ficient; plaintiff  
amends; upon an-  
swer coming in  
seventy excep-  
tions taken; mo-  
tion that these ex-  
ceptions be refer-  
red to the same  
Master with the  
former set,  
granted.

Mr. *Mansfield*, for the defendant, moved, that this second set of exceptions should be referred to the same Master to whom the former set had been referred; which was opposed by the plaintiff's counsel, who insisted that the alterations were such, that this was quite a new bill, and any other Master as competent judge of the relevancy and sufficiency of the parts referred to in answer against which exceptions had been taken, as the Master to whom the former exceptions were referred. But *Lord Chancellor* said, that as the allegations in the former part of the bill were the same, and the other matter must be connected with it, it was better the second exceptions should be referred to the same Master with the first, and therefore granted the motion (a).

[(a) *Lord Eldon*, upon this case being cited, expressed a doubt, obviously founded upon the correctest practice of the Court, whether these exceptions should have been proceeded upon at all. The practice being, that if exceptions are taken, and the answer is insufficient; and the plaintiff not moving to amend, the defendant answers the exceptions, when that answer comes in, the plaintiff cannot add to the number of the old exceptions. *Partridge v. Haycraft*, 11 Ves. 570, in which case it was accordingly deter-

mined, that where the plaintiff has obtained the usual order to amend, and that the defendant shall answer the amendments and exceptions together, he cannot take a new exception to any thing in the original bill, but must go before the Master upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments; which however the Master may consider with reference to such parts of the original bill as apply to them.]

EASTER TERM.

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19 GEO. III. 1779.

(f) THE PARISH OF ST. LUKE OLD STREET v. THE  
PARISH OF ST. LEONARD SHOREDITCH.

S. C.  
*Nom. Waring v.*  
*Hotnam*, 2 Dick.  
550.

**A** BILL filed by the parish plaintiffs, in order to have an issue directed to describe and ascertain the boundaries between it and the adjoining parish the defendants. The cause being heard

Bill will not lie  
to have an issue  
to ascertain  
boundaries be-  
tween two pa-  
rishes.

(f) Vide 2 Anst. Rep. 386; and Lord Chief Baron *Macdonald's* observations upon the above case, 395, *ibid.*



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at *Lincoln's-Inn-Hall*, Lord Chancellor doubted whether a bill would lie for this purpose, and ordered the counsel for the plaintiffs to look into the precedents and speak to it in term. And coming on now,

Mr. *Madocks* and Mr. *Macdonald*, in support of the bill, said there were several cases in which such bills were proper, and cited *Lethulier v. Lord Castlemain*, on the boundaries of the manors of *Aldersbrooke* and *Wanstead*, Sel. Ca. Ld. King, 60. (12 Vi. 267, pl. 29). Also, a similar issue was directed in *Bowes v. Lord Darlington*, 1755 (a). The bill lies as tending to prevent a multiplicity of suits. In the *Mayor of York v. Pilkington*, Lord *Hardwicke* allowed the demurrer because there was no privity, but afterwards changed his opinion, and over-ruled the demurrer. (1 Atk. 282.) There Lord *Hardwicke* laid down in what cases bills of peace were proper; such as in the case of duties, where many persons are interested who are not before the Court. Such a bill is proper for tithes, *Brown v. Vermuden*, 1 Ch. Ca. 272. So for a suit to a mill.—Sir *Lionel Pilkington's* case in the duchy. So for settling general fines to be paid by the tenants of a manor, *Cowper v. Clark*, 3 P. W. 155, though not for a single copyholder, to pay a reasonable fine. *Duke of Somerset v. France*, Fortesc. 42.—ibid. 44.—In 2 Atk. 483, Lord *Teynham v. Herbert*, it is laid down, that where the right cannot be settled in one or two actions, the party may come to this Court at first.—The case of *Webb v. Conyers* (b), was also mentioned, as an instance of such a bill between two lords, to try the boundaries of their manors, but it appeared the bill was dismissed.

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Lord Chancellor said, if he should entertain a bill and direct an issue in such a case as this, he did not see what case would be peculiar to the courts of law. He did not know how to extract a rule from the *Mayor of York v. Pilkington*. Where there was a common right to be tried, such a proceeding was to be understood; the boundary between the two jurisdictions was apparent. That is the case, where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried, by trying the right of one; but, in this case, he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom, on account of the poor laws. He apprehended these issues had usually been directed by consent of the parties.—He therefore dismissed the bill (c).

[(a) For the proceedings in these causes, vide 1 Eden, 270.]

[(b) Should be *Wake v. Conyers*, since reported 2 Cox, 360. 1 Eden, 331.]

[(c) See the cases upon this point collected and arranged in the note to

*Wake v. Conyers*, 1 Eden, 337; and particularly *Atkyns v. Hutton*, 3 Anst. 387; *Winterton v. Lord Egremont*, cited ib.; *The Attorney-General v. Fullarton*, 2 Ves. & Bea. 263; *Spear v. Crawler*, 3 Meriv. 410.]

SHIRLEY

## SHIRLEY v. EARL FERRERS.

1779.

**L**AURENCE Earl Ferrers, whilst in the *Tower*, charged his estate with £6,000, which, being raised upon the land, was invested in the funds, in the name of the Rev. *Walter Shirley*, his brother, in trust, to pay certain sums to the widow and children of *John Johnson* (whom the Earl had killed), the remainder to pay off certain debts (some by specialty, bearing various rates of interest, and others by simple contract); the residue to his own use. The late Earl contested the right of the trustee to raise the money, in consequence of which it lay in the funds till a decree was made in favour of the trust, and a reference to the Master to settle the several claims. A question arose before the Master, whether the simple-contract creditors should have interest, the fund which was for their benefit having produced interest. The Master thought the matter not before him, and reported only their original simple-contract debts due without interest. Upon an exception to the Master's report,

Money raised by deed upon land, and invested in the name of a trustee, to pay debts, the residue to the use of the trustee, the simple-contract debts are not changed in their nature, and therefore shall not bear interest. But if the creditors had filed bills, and obtained separate reports, from that time their debts would have carried interest.

Mr. *Mansfield*, for the creditors, insisted this provision was equivalent to making a schedule of the debts, and creating a trust term for the payment, which would be in the nature of a specialty, and make the simple-contract debts carry interest. *Barwell v. Parker*, 2 Ves. 363, which takes notice of *Car v. Lady Burlington*, 1 P. W. 228. *Lord Bath v. Lord Bradford*, 2 Ves. 587.

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Mr. *Bicknel* (on the same side).—This is not the case of a charge on land; the money here was raised, and as much Lord Ferrers's as if in his pocket. The trustee should have paid the money immediately, but could not, the late Earl opposing it. The land here has borne its burthen; the only question is, whether the trustee shall pocket the interest.

Mr. *Attorney-General* (for the trustee).—Where a fund is provided, either from land or otherwise, for the payment of debts, the Court gives interest only to those debts which from their nature bear interest, not to the others. Where debts are to be paid under a decree, interest is allowed only to those which bear interest. But Lord *Hardwicke* says, that if a man creates a trust term, and makes a schedule of his debts, it is in the nature of a specialty, because it gives a specific interest in the fund: but that is not this case, for there the creditor having an *aliquot* part of the fund, he must have the consequence.

Lord Chancellor.—The Court seems in that case to put it in the nature of a specialty by deed.

Mr.



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Mr. *Attorney-General* cited *Lloyd v. Williams*, 2 Atk. 108. The provision made by the party does not alter the nature of the debt. The meaning of the person creating such a fund always is, that it should be paid as soon as may be.

*Lord Chancellor*.—If they are entitled to an *aliquot* part they must be so to the whole produce, I cannot distinguish.

Mr. *Madocks* (on the same side).—If they are entitled, it must be either by the form of the debt or by some rule of the Court. The debt, upon the bond, is the principal and interest, therefore it is within the terms of the trust, interest must be paid as being part of the debt: but the simple-contract debts, not carrying interest at the time, the interest is no part of the debt. In the case of scheduled debts, the debtor converts it into a debt of a different nature.—*Lord Hardwicke* says of the case of *Car v. Burlington*, that it would overturn the course of the Court (2 Ves. 363), which is, that the Master shall compute interest on such debts as carry interest (a). The same is an answer to *Maxwell v. Wettenhall*, 2 P. W. 27. The general rule is, that where a fund is provided, the Master is not to compute interest on the simple-contract debts. *Shirley* is a trustee with an interest, he is to have the residue, and there is just as good reason that he should retain the interest against a person not entitled to it.

Mr. *Mansfield* in reply.—There are an abundance of cases where interest is given, at law, to debts not naturally bearing it. Many of these debts are for money paid, which would bear interest at law. The nature of the debts is not changed by being scheduled—the only difference is, that, in that case, the man knows what debts are due. This is not like the case of a trust term, where the interest increases the charge upon the land.

*Lord Chancellor*.—I look upon it the Master should not have computed interest at all in such a case; where there is long delay the Master should do it under the direction of the Court. If I were to allow the exception, it would be saying the Master was competent to judge of the effect of the deed. I think the Master ought not to take that upon himself. Upon the point itself, I cannot see how it could be allowed without breaking in upon the general rule. I thought it was conceived that, if it were a term, it should not be allowed, because it would press the land: but if the debts carried interest, why should not the land be pressed as well as any other fund? I do not see that it can depend upon the nature of the fund. If the residue had been to the grantor, it would

[(a) It appears from Mr. Cox's ed. of P. W., that there was no such declaration in the decree that the simple-contract debts should carry interest.]  
only

only have paid the debts. The whole practice of the Court is uniform, that creditors shall be paid interest according to the nature of their debts(a). I know it goes to great hardships, but it is not necessary that such hardships should be suffered, because, if the creditors had filed their bill, the debts would have carried interest from the separate reports, so that it is their own delay. But this is not before me, I think it was not the Master's business.

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*Exception over-ruled* without prejudice to a re-hearing.

[(a) See some of Lord Rosslyn's observations in the report of the case of *Craze v. Hunter*, 2 Ves. jun. 157.]

ROBERT SADDINGTON and SAMUEL GOADBY, } Plaintiffs.  
Assignees of EDWARD WEBBER, a Bankrupt, }

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ANDREW KINSMAN and JOANNA his Wife, and } Defendants.\*  
MATHEW DOVE, - - - - }

**B**Y indenture quadrupartite, dated 5th February, 1731, and made between John Guyse, gentleman, and Elizabeth his wife, of the first part, William Guyse, son of the said John Guyse, of the second part, John Scutt and Thomazine his wife, relict of Thomas Ayres, deceased; and Joanna Ayres, the only surviving child of the said Thomazine, by the said Thomas Ayres, her former husband, of the third part, and Richard Percy and John Cook, of the fourth part, after reciting a marriage then intended between the said William Guyse and Joanna Ayres, and that the said John Scutt had transferred £1,200, part of £1,500 South-sea annuities, and £100 South-sea stock, to the said Percy and Cook. It was witnessed that the said £1,200 South-sea annuities, and £1,000 South-sea stock, had been so transferred to Percy and Cook, in trust, after the marriage, for the said William Guyse for life, and to permit him to receive the dividends thereof for his own use, and, after his death, in trust for the said Joanna his intended wife, for life, and to permit her to receive the dividends for her own use, and after the death of the survivor, in trust, for the use of such child or children as the said William Guyse should have by the said Joanna, in such parts and proportions as the said William Guyse by his will, or any other writing under his hand and seal, executed in the presence of two witnesses, should direct or appoint, and for want of such appointment, then in trust for all the children of the said William Guyse by the said Joanna, to be equally divided, if more than one, and if but one to the use of

What interests of the wife so vest in the husband, as to vest in his assignees upon a bankruptcy.

\* The argument in this case goes so fully into the subject, that it was thought worth while to insert it here, although it never received a decision.

such

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*such only child*; and in default of such issue, then in trust for the survivor of them the said *William Guyse* and *Joanna*, and the executors or administrators of such survivor. The said sums of £1,200 *South-sea* annuities and £1,000 *South-sea* stock were actually transferred to *Percy* and *Cook*, and, soon after the execution of the said indenture, the marriage between *William Guyse* and *Joanna Ayres* took effect. The said *William Guyse* had issue by the said *Joanna* his wife a daughter named *Joanna* (now *Joanna Kinsman*, one of the defendants); and in 1753, a marriage being in contemplation between the said *Joanna* the daughter, and *Edward Webber* the bankrupt, previous to such marriage *William Guyse* executed a deed of appointment, dated the 14th of *March*, 1753, and made between *Edward Webber* of the first part, *William Guyse* and *Joanna* his wife, and *Joanna* their daughter (the defendant) of the second part, and *Obadiah Jones* of the third part; whereby, after reciting the indenture of the 5th of *February*, 1731, and that the trust estate had been changed by act of parliament, and then consisted of £1,192 : 4s : 2d. *South-sea* annuities, £698 : 7s : 10d. new *South-sea* annuities, and £234 : 7s : 6d. *South-sea* stock, then standing in the joint names of the said *Percy* and *Cook* upon the trusts of the indentures of the 5th *February*, 1731, and reciting the marriage then intended between the said *Edward Webber* and *Joanna* the daughter, and that the said *William Guyse*, in consideration thereof, and of the provision therein mentioned to have been agreed to be made by the said *Edward Webber* for the said *Joanna* his then intended wife, and the issue of the marriage, had agreed to pay the said *Webber*, as the present portion of the said *Joanna* his daughter, £1,050, and also to appoint the said annuities and stock, after the decease of himself the said *William Guyse* and *Joanna* his wife, for the use of the said *Joanna* his daughter, so that the same might be taken and enjoyed by the said *Edward Webber*, his executors and administrators, in further part of the portion of the said *Joanna*. He, by virtue of the power given him by the said indenture of the 5th of *February*, 1731, did, with the consent of *Joanna* his wife, appoint the said £1,192 : 4s : 2d. *South-sea* annuities, £698 : 7s : 10d. new *South-sea* annuities, and £234 : 7s : 6d. *South-sea* stock, then standing in the names of the trustees, unto the said *Joanna* his daughter, in case the marriage should take effect, and covenanted that the surviving trustee of the former settlements should, immediately after the decease of the survivor of them the said *William Guyse* and *Joanna* his wife, stand possessed of the said annuities and stock, in trust for the benefit of the said *Edward Webber*, his executors and administrators, to the intent that *Edward Webber*, his executors or administrators, might cause the same to be transferred as he or they should direct, and, in the mean time, receive and enjoy the same for his and their own use and benefit; and in that indenture was contained a proviso respecting other children (if there should be any)

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my) of the said *William Guyse* and *Joanna* his wife, and that, during the lives of the said *William Guyse* and *Joanna* his wife, and of the survivor, they and their surviving trustee might, with the consent of *Edward Webber*, his executors or administrators, change the securities, or lay out the same in the purchase of lands, but nevertheless such new securities or lands to be upon the same trusts, and subject to the same provisos as were in the indentures of the 5th of *February*, 1731, and 14th *March*, 1753, declared, concerning the said annuities and stock. *Webber*, on his part, entered into a covenant to leave her half of her fortune by will, if there should be no children, and one-third if there should. Soon after the execution of these deeds, the marriage between *Edward Webber* and *Joanna* the daughter took place. *William Guyse* had never any other child by *Joanna* his wife than their daughter *Joanna*, the wife of said *Edward Webber*, and, some time in the year 1756 the said *William Guyse* died, leaving the said *Joanna* his wife, and said *Joanna Webber* his only child surviving him, and having made his will whereby he gave to his daughter *Joanna Webber* all or the greatest part of his estate, real and personal, in case she survived her said husband and mother. On the 17th *December*, 1763, a commission of bankruptcy issued against *Webber*, who was found bankrupt, and *Albert Inness*, *Benjamin Vowell*, and *William Johnson*, were chosen assignees, and an assignment of his estate was made to them under the said commission; but the said assignees were afterwards removed by an order of the *Lord Chancellor*, made for that purpose. And thereupon the plaintiffs were chosen assignees in their place, and an assignment of the bankrupt's estate was made to them; by virtue whereof they became entitled to possess themselves of the bankrupt's estate, in trust for the creditors. In 1772 *Webber* the bankrupt died, leaving *Joanna* his wife, and the said *Joanna Guyse* her mother, him surviving, and afterwards, in 1774, the said *Joanna Guyse* also died, leaving the said *Joanna Webber* her surviving. *Joanna Webber*, after the death of *Edward Webber*, intermarried with the defendant *Andrew Kinsman*; and *Richard Percy*, the surviving trustee (since dead) having made his will, and appointed the defendants *Andrew Kinsman* and *Joanna* his wife, and *Matthew Dove*, executors, who proved the same and are the said *Richard Percy*'s personal representatives, the plaintiffs, the assignees of *Webber*, the first husband of *Joanna Kinsman*, November 1st, 1777, filed this bill, insisting that there having been no other issue of *William Guyse* and *Joanna* his wife, than *Joanna* the defendant, *Webber* became, upon the death of *William Guyse*, entitled by virtue of the indenture of 14th *March*, 1753, to the said annuity and stock (subject to the interest of *Joanna Guyse*), that the annuities and stock vested in them by the assignment, and that upon the death of *Joanna Guyse*, they became entitled thereto in trust for the creditors.

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Mr. *Ambler*, and Mr. *Bicknel*, for the plaintiffs, insisted, that whatever property of the wife the husband could dispose of by any means was his, and vested in the commissioners, and was assigned by them to the assignees, and that this was such an interest as the husband might depart from, being releasable by him. That being vested in the husband, and passing by the assignment, there would be no necessity for a fresh assignment when it came into possession. They cited *Miles v. Williams*, 1 P. W. 249. *Jacobson v. Williams*, 1 P. W. 382. *Bosvil v. Brander*, *ibid.* 458, and offered on the part of the plaintiff, if the Court should think it necessary, to make a provision out of the money for Mrs. *Kinsman*.

Mr. *Attorney-General* (for the defendants) contended, that this money not having become payable before the bankruptcy, or in the life-time of the husband, was not assignable by the commissioners, but survived to the wife like a debt, or any other property, over which he had not exercised any act of ownership; which, though he might have reduced it into possession, yet not having done so it would survive.

Mr. *Madocks* (on the same side) (a).—By the settlement, “If there should be but one child, that child was to have the whole sum; if more, in such form, manner, and proportions as the father should appoint.” The father therefore in this case had no power of appointment, it was to the use of the child. It is said, she is bound by the settlement; but I should submit that she might make her election. The covenant in the marriage settlement has produced her nothing, it would be hard she should be bound by it. As to the nature of the property, it is not in possession, though to become so after the death of the father and mother. The husband could not reduce it into possession, no suit would lie living the mother who survived the husband. In *Rawlinson v. Moore*, 24th March, 1778, rents of the wife’s estate had accrued after the bankruptcy, but living the husband, who died after the bill filed, but before the hearing; and it was held that not having been reduced into possession by the husband, they survived; and the bill was dismissed.—So is *Burnet v. Kinnaston*, 2 Vern. 401. The words of the act of parliament of 13 Eliz. are applied to a different purpose; the two acts of *James* have brought into the power of the commissioners other interests, as equities of redemption and estates tail (that is, the whole interest) all that the bankrupt is possessed of with the consent of the true owner, all interests with which he may lawfully depart. A husband may, for a valuable consideration, assign his wife’s *chose in action*; but it must be subject to equity, and where he has a present right of action, not a right of action to accrue in future. In Co. Lit. 351, the

[(a) Vide *Woollands v. Croucher*, 12 Ves. 174, where Sir W. Grant, particularly notices Mr. *Madocks*’s argument.]

rule is laid down; at law the husband acquires by the marriage a right to the *choses in action* of the wife, so as to reduce them into possession, or to release them: where the right is a present right, he may bring the action in his own name, and that of his wife, and recover.—This Court has acted upon equitable assignments, the right of action is the subject transferred.—At law the judgment shall be to the husband alone: but where it is to the husband and wife, it survives to the wife.—This Court, in analogy to the courts of law, has held that the husband may assign the wife's *choses in action* for a valuable consideration; but if he has not a right of action, he assigns nothing—the assignment is subject to every equity the wife had against the husband, if the assignees come into this Court. Will this Court say, that the assignment can pass any thing to which the husband has not a present right? Here neither the husband nor the wife had a present interest during the life of the mother. In the case of a personal annuity, where a new right of action accrues as to every payment, can the husband at law release the annuity, which would be releasing a right of action to accrue after his death? He may assign for their joint lives, but not so as to bar the wife after the decease of the husband. The case of *Thomson v. Butler*, Mo. 522. shews the husband cannot release a future right of action of the wife; from the nature of property he cannot pass what he has not,—where the property of the wife is reversionary, he has not a right of action, and cannot transfer it. These are rules of equity, where *æquitas sequitur legem*. A court of equity can only follow the law which declares what the husband shall have by marriage. This is somewhat different from a *chose in action*. It is not a bond payable at a future time, but a trust suable only in this Court—The thing remains to the wife, after the death of the husband, he only obtaining a right to sue as a means of making it his own. Where he had no right to sue, or possession of the thing, it continues the wife's. Nothing can pass to the assignees, but what the statute says shall pass, there is not a word in the statute to pass this property, unless the word *debts* will. An application from the assignees has not the same effect as the application of the husband would. There is no word applies to this but debts, which, in the most liberal sense, is only the right which the husband had in the debts.—There is a great distinction in good sense between what the wife has in possession, which gives the husband credit, and what she has in reversion, from which he has no credit. There is no reason why the law should bear hard upon wives, as to future interests.—It would extend to casual and contingent interests, as the bankrupt laws do where they belong to the husband himself.

*Lord Chancellor*.—If there was a settlement, would he not be a purchaser of her reversionary right?

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Mr. *Madocks*.—Here is no jointure, only the husband's covenant, which has come to nothing.

Mr. *Hollist*, on the same side.—It is contended first, that *Webber* was a purchaser of this reversionary right, but there never was a valuable consideration given for it. *Webber* had 1,000 guineas with her, and only covenanted to leave her half if there should be no issue, and one third if there should. In *Drury v. Drury* (a), (5 Bro. P. C. 570, by the name of Earl of *Buckingham v. Drury*) there was a settlement in bar of dower, and she had confirmed it by acts done when of age—There it is laid down that he might have sold or released this interest.—*Choses in action* are not intended to pass by the assignment. The statute of *H. 8.* is not now in force, and no subsequent act contains any such thing. *Bates v. Dandy*, 2 Atk. 207, the disposition of the wife's *choses in action* for a valuable consideration, only extends as far as the consideration.—Stress is laid upon the word *possibility*. It is answered by *right of action*, and is applied to the bankrupt's property.—The whole right he has over his wife's property, is a right of disposing of it by certain acts, not without them. *What he may lawfully depart with* only signifies the bankrupt's property. If the bankrupt had broken his trust as a trustee, would not the assignees put the *cestui qui trust* to come in as a creditor? This was not mere personal property, for, by the original settlement, the property was to be laid out in land at the discretion of the mother. It is admitted the assignees must make a provision for the wife. Under similar circumstances \* in *Gayer v. Wilkinson*, the Court dismissed the bill.

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\* *Gayer v. Wilkinson*, 8th and 15th November, 1773, was as follows:

Bill original and supplemental to transfer to plaintiffs £2,000 *South-sea* stock, with the dividends thereon, since the death of *James Sadler*, to the time of the transfer, and that the *South-sea* company might permit such transfer to be made.

The question arose on the will of *Robert Smith*, who, on the 22d of February, 1737, bequeathed as follows, (*viz.*) I give and bequeath unto *George Stringer*, £2,000 *South-sea* stock, in trust, that he shall from time to time, pay the interest, dividends, and proceeds of the same, as the same shall become due and payable, unto my nephew *James Sadler*, to and for his own use for his life, and, from and after his decease, I give and devise the said £2,000 *South-sea* stock, with the interest, dividends, and proceeds thereof, in trust, to and for the benefit of *Ursula*, *Mary*, *Elizabeth*, and *James Sadler*, children of my said nephew, equally between them, share and share alike, and to be transferred to them after the death of my said nephew, when they shall attain their respective ages of 21 years, or days of marriage; and if any or either of them die before his or her share shall become payable as aforesaid, then the share of him or her so dying shall go and be transferred to and amongst the survivors and survivor of them, share and share alike, payable as aforesaid. *Robert Smith* died without revoking his will, which was proved—*Ursula* and *James Sadler* died infants, in the life-time of the testator. *Mary* and *Elizabeth* attained 21, *Elizabeth* married *Richard Astley*, and, having survived her husband, died intestate, in the life-time of her father *James Sadler*, leaving the defendant, *John Astley*, the infant, her only child. The defendant *Mary*, (the other daughter, married *Andrew Pier-*

son,

[ (a) Since reported, 2 Eden, 60.]

bill. Here the bankrupt has absolutely had more than half the property already, he has had as much as he ought to have. Even in *Jackson v. Williams*, the money was given to the wife.

Mr. Ambler in reply.—The appointment passes all the interest of the wife to the husband. *Drury v. Drury* was all in covenant. *Harvey v. Ashley*, 3 Atk. 607, shews that the husband is a purchaser by the settlement, and there is an end of the question. No provision need be made.—Then upon the other head—Had it not been for the case of *Gayer v. Wilkinson*, the present could not have taken so much time.—If that case be right, all the other cases in this Court are wrong. All the husband's property, *in possession, contingency, or reversion*, passes by the assignment—those words have been considered as passing every possible interest. *Higden v. Williamson*, 3 P. W. 192. Why does this Court say the assignees shall make a provision for the wife out of the property, if it does not pass? *Jacobson v. Williams* is a case in point.—I cannot put the matter more strongly than it is in the cases, particularly in that of *Miles v. Williams*; the Court there said, that *choses in action* were not assignable but to the king; and that was held sufficient to pass it to the assignees. The bankrupt had another way of exercising his power, he might have assigned it, and, if for valuable consideration, it would not only have deprived the wife of the right, but of a provision. A release would do, and if he can reduce it into possession, or release it, it will pass to the assignees. All the cases, till that before Lord Bathurst, (*Gayer v. Wilkinson*) are upon that ground, *Jewson v. Moulson*, 2 Atk. 417. *Taylor v. Wheeler*, 2 Vern. 564.

Lord Chancellor asked whether it was considered as the law of the Court, that, if the husband should assign the *chose in action* without consideration, it will bind the wife, could a volunteer come against her into this Court?—and whether the counsel knew of any case that, in point, contradicts *Gayer v. Wilkinson*, himself not recollecting any. He observed that in the case of an assignment for valuable consideration no provision is made for the wife.

son, who, in the life-time of James Sadler the father, became a bankrupt, and the plaintiffs were chosen assignees, and on the 13th of September, 1768, had an assignment made to them of the bankrupt's estate. On the 28th of September, 1768, James Sadler the father died, and since that the bankrupt Pierson departed this life. George Stringer being dead intestate, the defendant Thomas Wilkinson was made his administrator to substantiate the proceedings.

Two questions arose (the first, totally out of the present case). The second, which was the principal question in the cause, whether the assignees of Andrew Pierson the bankrupt were entitled to any and what part of the said stock? They insisted that the statutes of bankruptcy vested the husband's right in the assignees as effectually as if it had been reduced into possession. But the Lord Chancellor dismissed the bill.

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Mr. *Ambler* the next day cited, as instances of a voluntary assignment, *Squibb v. Wyn*, 1 P.W. 378, and \* *Shepherd v. Shepherd*, where a bill being brought to charge the estate, the Court made a decree.

*Lord Chancellor*.—A voluntary assignment of real estate undoubtedly binds.

The cause stood over, for *Lord Chancellor* to form his opinion: but the parties, finding the delay inconvenient, came to a compromise, and divided the property in question between them † (b).

\* This case, the reporter understands, was as follows: The husband had made a will some years before his death, having then children, to whom, as well as the wife, he had left large fortunes; afterwards he had other children, and died without altering his will, by which these younger children were left without a provision. This occasioned a question in the family, whether the birth of the children was not a revocation of the will, and a bill was either filed, or intended so to be, in order to decide the question. The question was brought on in the ecclesiastical court, see the judgment of Dr. *Hay*, reported at length, 5 T. R. 51, n. Upon this the widow and the elder children, came into a compromise with the younger children, in consequence of which £1,000 each was agreed to be paid to them out of the estate devised to the mother and elder children; and upon a bill, afterwards filed, to subject the estate to the charge, the Court made a decree for that purpose.

† See as to the subject of this case, *Worral v. Marlar*, and *Bushman v. Pell*, in the note in Mr. Cox's edition of *Peere Williams's Reports*, vol. i. p. 450, and *Oswell v. Probart*, 2 Ves. jun. 680. (a)

[(a) The case of *Worral v. Marlar*, and *Bushman v. Pell*, has since been reported at length, 1 Cox, 153. As to the general doctrine upon the wife's equity against her husband's assignees, vide *Prior v. Hill*, post, vol. iv. 48.]

[(b) As to the power of the husband over the wife's choses in action, vide 1 Fonb. on Eq. 313. Mr. Raithby's note to *Oglander v. Baston*, 1 Vern: 396. *Forbes v. Phipps*, 1 Eden, 502. *Milner v. Milner*, 2 T. R. 627.]

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2 Dick. 550.

PEMBER and his Wife v. MATHERS.

The evidence of one witness, corroborated by circumstances, though to facts denied by the defendant's answer, sufficient to found a decree.

A BILL brought by the original lessees of a leasehold estate, against the assignee of the lease, for a specific performance of an undertaking stated in the bill, to indemnify the plaintiffs against all rents and covenants, to be paid or kept on the lessee's part toward the original lessor, and to execute a bond for securing such indemnity. The assignment had been by sale, by auction; the conditions of sale did not stipulate the indemnity stated in the bill, and it was supported only by the evidence of *Hogard* the auctioneer, who swore such agreement was entered into by the plaintiff and defendant before the sale, the answer denied the agreement. The defendant, the original assignee, had made another assignment of the lease to a third person (not a party) before the bill brought.

Mr.

Mr. *Mansfield* and Mr. *Selwyn*, for the plaintiffs.—The only authority that the evidence of one witness shall not be admitted against the defendant's answer is that in *Vernon*; (*Alam v. Jourdan*, 1 Vern. 161.) but, where such testimony is supported by circumstances, it is sufficient, even in an indictment for perjury. It would be so in a trial at law, if the party sued there for damages. It is strange, then, that it should not be sufficient here, to ground a specific performance.—The conditions of sale imply the agreement, and, upon a bill for specific performance of those conditions if the plaintiff insisted such a covenant should be inserted, there is no doubt the Master would have inserted it. There is a case in *Strange*\* of an assignment to a beggar; the judges said it was the folly of the first assignor, in not taking such a covenant from his assignee. The assignment is subject to the rents and covenants on the lessee's part, which would be unnecessary between the assignor and assignee. If there were a covenant to build, or any other covenant which does not run with the land, the assignee would be bound under these conditions. The plaintiff here can call upon no sub-assignee, and if he does not succeed against the defendant must be ruined.

Mr. *Attorney-General*, Mr. *Kenyon*, and Mr. *Hollist* for the defendant:—The conditions of sale must be presumed to contain all the terms of the contract.—The assignee, at law, is only liable for the rents and covenants, whilst he is in possession, although the original lessee is so for the whole term. In this case they should have brought the present assignee before the Court. No decree can be made upon the evidence of one witness, contradicting the defendant's answer.—This is the established rule of the Court, *Wakelin v. Walthall*, 2 Ch. Ca. 8. *Alam v. Jourdan*, 1 Vern. 161. *Walton v. Hobbs*, 2 Atk. 19. *Only v. Walker*, 3 Atk. 407.

Lord Chancellor.—I take the rule to be, that, where the defendant, in express terms, negatives the allegations of the bill, and the evidence is only one person, affirming what has been so negatived, there the Court will neither make a decree, nor send it to a trial at law. Where the Court does send it to a trial at law, it orders the answer to be read in evidence, and sends it to the court of law only to find the consequences; because the court of equity has such a rule, therefore it refers to a court of law what a court of equity ought to do. This was done by the House of Lords in † Lord *Milton's* case. The original rule stands on great authorities, so does the manner of liquidating it: I do not see great reason in either. The rule is subject to this modification, that if there are circumstances sufficient to turn the scale, it ought to be

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\* *Lekeu v. Nash*, 2 Str. 1201. See also *Valliant v. Dodemead*, 2 Atk. 546.† *Lord Milton v. Edgworth*, 6 Bro. P. C. 580.

turned;

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turned; the oath of a bye-stander, with circumstances corroborating it, is better than that of an interested person. Here, the estate was to be sold out and out by auction, the vendor would expect to have no more connection with the original lessor. The terms imply, that the assignee should stand in the place of the original lessee. Suppose there had been no assignment, but the money ready to be paid, and the instrument tendered without such covenants, and referred to the Master, the Master, or the Court upon exceptions, would have thought the covenant to indemnify ought to be included. Here is a witness to swear it was so agreed. The first objection made is that the evidence is inadmissible, upon the ground that, where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule is right; but, where the objection was originally made, and promised by the other party to be rectified, it comes among the string of cases in 1 Eq. Ab. 230, 231, where it is considered as a fraud upon the rule of law. Then, the evidence is admissible, which brings it back to its being that of only one witness. The most that could be expected would be to send it to a trial. I do not incline to that, for I could only send it to know what a court of equity ought to do. I think the plaintiff ought to have his decree: the rather because I think I ought not to hear a cause for specific performance, and not decide it.

Mr. *Hollist* suggesting that Mr. *Fell* was present at the execution of the deed, *Lord Chancellor* ordered it to go to law, upon an issue whether there was such a promise on the day of the execution of the assignment. Upon the trial the jury found there was such a promise, and the plaintiff had a decree for a specific performance\*.

\* See *Janson v. Rany*, 2 Atk. 140. *Leneve v. Leneve*, 1 Ves. 66. *Arnot v. Biscoe*, 1 Ves. 97. *Reech v. Kennegal*, ib. 125 (a).

[(a) See also *Howorth v. Deem*, 1 Eden, 351. *Lord Cranstown v. Johnson*, 3 Ves. 170. *Evans v. Bicknell*, 6 Ves. 185, and *The East India Company v. Donald*, 9 Ves. 275, where this case is particularly noticed. *Pilling v. Armitage*, 12 Ves. 80.]

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## RANDAL v. PAYNE.

Testator devised, subject to this contingency; if either of the devisees should marry into the families of *Rirington* or *Gosling*, and have a son, I give all my estate to him for life with remainders over; if not to *Randal*. The devisees married, but not into the favoured families. *Randal* files his bill, but dismissed, for the devisees have their whole lives to perform the condition.

**W**ALSH, by his last will, after several pecuniary legacies, gave to *Francis Gosling* and — *Payne* the sum of £4,000, for the use of *Jane Wood*, if she should marry with consent of the trustees, if not, then only £1,000; also to the same trustees £4,000, for

the

the use of *Martha Wood*, if she should marry with their consent, if not, only £1,000.—then there was this clause, “if either of these girls should marry into the families of *Gosling*, or *Rivington*, and have a son, I give all my estate to him for life (with remainders over); if they shall not marry, then I give the £8,000 and all my estate to — *Randal* (the plaintiff) for life, and, if he has a son, then to that son for ever, but not to come to him till twenty-four; if he has no son, then to *Francis Gosling*.” A bill was filed, and there was a decree that the money should be invested in the funds till the event should happen, and for leave to the parties interested to apply as occasions should arise. The *Woods* married with consent, but to *Greenough* and *Bret*, not into the families of *Rivington* or *Gosling*, upon which the present plaintiff filed his bill for the residue, as being now forfeited to him.

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 v.
 PAYNE.

Mr. Mansfield for the plaintiff.—The devise, if the devisees should not marry according to the prescription, affects the residuary estate;—if they married with consent, but not into the families of *Rivington* or *Gosling*, then the residue was to go to *Randal*. The defence of the *Woods* is extraordinary, that the reversion, in case they should not marry into the families, is not yet fallen in; for, though they are now married, their husbands may die, and they may hereafter marry into the favoured families; and, therefore, *Randal's* right may never exist. The contingency must have the contrary construction, that if they married, otherwise than into the families, the residue was to go over; it was expected the event would happen in the life of *Randal*, who was thirty years older than either of the *Woods*. *Mr. Gosling* contends that *Randal's* son must attain twenty-four years of age: but the only event in which it can go over to *Gosling*, is that of *Randal* having no son, or that son dying before twenty-four.

Lord Chancellor.—Till they married nothing could vest, for marriage was a condition precedent: then could any thing vest till the whole contingency became impossible?—That suspends it during their lives.—You suppose, if they once married, they had lost all chance of marrying a *Rivington* or *Gosling*; if he had said so, it would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the Court would not incline to refuse him. The decree that the money should be invested, &c. must be carried into execution (a).

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[(a) Vide Co. Litt. 208 b. §19 a.]

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BENCRAFT v. RICH.

Money in the funds belonging to wards of the Court, cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a Master, and his report made.

THE bill was, that the trustees under the will of the late Mr. Rich, patentee of *Covent Garden* theatre, might transfer the respective shares of the sum for which the house, &c. sold, belonging to the children and infant grand-children of Rich (now in the funds), into the name of the accountant-general, subject to the further order of the Court.

Lord Chancellor said, it could not be done without the account being taken before the Master, which could not take much time where the parties were satisfied the trustees had conducted themselves properly, and therefore ordered the account to be taken, and a report made, and that then the parties might be at liberty to apply.

Lincoln's-Inn-Hall, 1st Seal after Term.

Application that a cause may be set down upon an early day, must be by petition. Putting in a plea a sufficient compliance with orders for time to answer.

ROBERTS v. HARTLEY.

THE application that a cause may be set down upon an early day must be by petition, not by motion.—On the motion of Mr. Kenyon.

In the same cause,

The defendant having applied for, and obtained, three orders for time to answer (not to plead answer or demur), upon the expiration of the last order, put in plea. Mr. *Attorney-General* (assisted by Mr. Kenyon and Mr. Piggott) moved that the plea should be suppressed, as irregularly put in. Mr. Kenyon cited *Gilb. Chan. 92. 1 Harris. Chan. 359. citing Mos. 207, pl. 116.*

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Mr. Mansfield and Mr. Selwyn, on the other side, contended that the order was satisfied by a plea being put in; and cited *Jones v. Lord Strafford, 3 P. W. 79.*

Lord Chancellor refused to suppress the plea, holding it a sufficient compliance with the order;* but as, from the complexion of the case, the defendant appeared to be using manifest delay, in order to keep possession of a large sum of money (the produce of the sale of *Le Gaston*, a rich *French East-Indiaman*, taken by the plaintiff's private ship of war), in question between the parties, ordered the plea to be argued the next day.

* Otherwise of a demurrer, though only to part and answer to the other part, *Vide Kenrick v. Clayton, post, vol. ii. p. 214. (a)*

[(a) And see particularly *Taylor v. Udny, 1 Ves. & Bea. 355.* *Milner, 10 Ves. 444. De Minkwitz v.*

Accordingly

Accordingly it was so; and the plea being a sentence of the court of admiralty, (g) *which was recited in the bill*, and consequently bringing no new matter upon the record, was on that ground over-ruled (a).

tence of the Court of Admiralty, recited in the bill, over-ruled, as matter before the Court.

A motion was then made that the money be paid into Court, and an affidavit being read (which had been before refused because there was then a plea in Court), but not specifying any sum in particular, to be had in the hands of the defendants, it was refused.

(g) By the statement of this case in Reg. Lib. B. 1778, p. 394, it appears, that the *sentence* was only *generally* mentioned, and not recited in the bill.

[(a) Vide *Philips v. Gibbon*, 16 Ves. 184.]

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Plea of a sen-
bringing no new

Motion to pay
money into Court,
and the affidavit
not specifying the
sum in defend-
ant's hands, re-
fused.

WHITELEGG v. WHITELEGG.

MOTION for an injunction to stay waste, upon an affidavit, generally, that the plaintiff was entitled to the fee-simple of the estate, and that waste was committed. Refused by *Lord Chancellor*, for a particular title must be set out; upon this being done, and the only opposition by a similar affidavit to the first, on the part of the defendant,

In order to obtain
injunction to stay
waste, the affida-
vit must set out a
particular title.

Motion granted.

TRINITY TERM.

19 GEO. III. 1779.

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LAWSON v. HUDSON.

HYLTON *Lawson*, esq. the plaintiff's late husband, being seised in fee, by descent, of an estate at *Cramlington*, in *Northumberland*, and other real estates both freehold and copyhold, by his will, dated 14th *April*, 1748, devised the estate at *Cramlington* (which was subject to a mortgage for £1,500, contracted by his ancestor), and also another estate to be sold; and charged the same, and also all his personal estate (except £300, due on bond, which was originally part of the wife's fortune, and specifically bequeathed to her by the will) with his debts and legacies, and devised the residue of his real estate in trust for his brother *John* in strict settlement, subject to a charge of £100 a year to the plaintiff upon the copyhold estate. He also bequeathed to

Testator charges
his real estate
(which was sub-
ject to a mort-
gage, contracted
by his ancestor),
and also all his
personal estate,
with his debts and
legacies. The
mortgage shall be
borne by the es-
tate originally
liable, not paid
out of his estates;
and the executrix,
the money.

having paid it out of the personal estate, shall be repaid

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A legacy of £100 out of the freehold and copyhold estate, also to be borne by that fund, not paid out of the personal estate.

his god-daughter *Winifred Collingwood* £100, out of the freehold and copyhold estate as aforesaid, and made the plaintiff, his wife, executrix. The opinion entertained by the widow and family being, that the personal property was taken by her, liable to the debts and to distribution, she paid off the charge upon the *Cramlington* estate, and the mortgagee assigned the same to the defendant *Hudson*, to attend the inheritance; but it having been determined in the House of Lords,* that she was entitled to the whole residue of the personal estate as executrix, she applied to the person in possession (the brother) for re-payment of the money so paid by her, in her own wrong, and filed this bill, in which the question was, whether, under the will of *Hylton Lawson*, the personal estate was to be applied in exoneration of the real.

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Mr. *Attorney-General* for the plaintiff (last term).—Mr. *Lawson* (the brother) contends that the personal estate was to pay the debts and legacies. Here the very estate mortgaged is that made liable. The estate had descended with the mortgage, *Hylton Lawson's* personal property could not be liable, the devise extends only to his *own* debts. As to the legacy of £100 charged upon the freehold and copyhold estates, if the Court should be of opinion that it is only in aid of the personal estate, the plaintiff's bill must be dismissed as to that part; if, on the contrary, the opinion should be that that was a charge upon the freehold and copyhold only, she must also be paid that.

Mr. *Ainge*, on the same side.—Mrs. *Lawson*, having paid the mortgage, it is the same as if it was now in the mortgagee's hands. Mr. *Lawson's* personal estate did not receive any benefit from the mortgage; he took the estate with the *onus* upon it. The legacy of £100 was not a general legacy; the meaning was not that it should come out of the personal estate, but expressly out of the real.

Mr. *Scott*, on the same side.—The objection that Mrs. *Lawson* paid voluntarily, is of little weight in a Court which corrects mistakes. As to the £1,500 it was not his debt, the Court will not presume he meant to load his personal estate with it, as the law does it not, without declaration plain. As to the £100 being laid on a certain fund; if the will had not been duly attested to pass real estate, this legacy could not have been recovered. There is no circumstance in the case to lead to an inference that he meant to pay a debt not his own; but, if there is any presumption, it will be that he meant it to lie where the law has placed it.

Mr. *Madocks* for defendants (in this present term).—Mrs. *Lawson* paid the mortgage and acquiesced eight years. The father had

* April 28, 1777.—See 7 Bro. P. C. p. 511 (a).

[(a) Edit. Toml. vol. iv. p. 21.]

incumbered the estate; then it is said to be a question, whether this could be called *his* (*Hilton's*) debt.—He was seised in fee by descent, then it was *his* debt. It was a debt to which his property was liable. The legacy is equally clear, his real estates are charged with debts and legacies, “and also all his personal estate.” The rule therefore that the personal estate shall not be exempted without express words applies; here are no express words to negative the application of the personal estate.

It does not follow because a person says a legacy shall go out of a particular fund, that he does not mean it should be paid out of the personalty, it may be to charge that fund, if the personalty shall not be sufficient to pay all.

Lord Chancellor.—If the copyhold had not been surrendered, and the will not so executed as to pass lands, could this legacy have been raised?

Mr. Macdonald, on the same side.—The question is, whether the testator adopted the mortgage as his own debt.—There is enough in the case to shew that he intended this should be paid out of the general fund of his personal estate. The grounds upon which they argue are these, that he devotes, to the payment of his debts, the very estate subject to the charge, and the *residuum* is not given away.—Then it only remains as to the legacy: there was a good reason for mentioning the real estate first, because when the will was made, his personal property was very small. But this is not sufficient to overturn the general rule.

Mr. Mitford on the same side.—The direction is, that the real estate with *all* his personal estate should be applied, this is an extraordinary use of the word *all*.—*Pockley v. Pockley*, 1 Vern. 26, shews the party may adopt such a mortgage as this. *Mrs. Lawson* takes the personal estate not as a bounty, but by legal title, the real estates are taken as specific devises.

Mr. Scott mentioned *Evelyn v. Evelyn*, 2 P. W. 591.

Lord Chancellor.—The first question is, Whether the £1,500 should have been paid out of the personal estate, if the testator had left no direction about it. The second, whether the £100 should not come out of the freehold and copyhold estate. It struck me, that if the will was not so executed as to pass real estate, this £100 could not be raised. As to the £1,500, the only question is, whether the circumstance of his directing his debts to be paid out of the real and personal estate, would transfer it, from the estate originally liable, to the personal estate. It struck me, it made the real and personal estate only liable to debts beyond that. Another question is, whether its being actually paid off makes any

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any difference. If paid in her own wrong it cannot affect the case. The £100 must be repaid, as it is to be raised out of the freehold and copyhold, and the £1,500 from the estate originally liable to it (a).

This decree was affirmed in the House of Lords, on the 27th Feb. 1781 (b).

(a) Vide *Billinghurst v. Walker*, post, vol. ii. 604. and *Hamilton v. Worley*, post, vol. iv. 199. and the Editor's note to the former case.]

[(b) 3 Bro. P. C. edit. Toml. 424.]

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WRIGHT v. ROW.

Money charged upon a real estate, for a charity, (void by the statute of mortmain) shall sink in favour of the specific devisee, not go to the heir at law or residuary legatee. *Secus* when it is an exception out of the devise.

THIS was a devise, in trust, among other things, to pay £4 a year arising out of real estate to a charity. The principal case was referred to the Master, to enquire whether it was prior to the stat. 9 Geo. 2. and the trusts were to be carried into execution. The cases cited were *Wright v. Horne*, 8 Mod. 222, as to the general favour of an heir, *Durour v. Motteux*, 1 Ves. 320. **Grosvenor v. Hallam*, before Lord Camden, 7th March, 1767. *Barrington v. Hereford*, before Lord Apsley, this was £1,000 left to be laid out in lands, in trust, for *Barrington*, charged with an annual sum to a charity, the Master of the Rolls gave it to the residuary legatee, but the Chancellor decreed in favour of the specific devisee, as arising out of his estate†.

* *Robert Goldsbury* by his will gave to the plaintiffs his executors, his messuage in *Ipswich* (subject to a charge of £10 given out of the same for ever), to be sold, and after payment of debts, &c. the residue to some of the defendants; he then disposed of the charge, upon trusts, some of which were void as charitable uses, and others as being given to churchwardens, who, not being a corporation, could not take. The question was, whether the charge should go to the heir at law, or to the residuary legatees (who were legatees of money only to arise from the sale). Lord Camden declared that the rent-charge belonged to the heir at law, it not having been devised to the residuary legatee. Amb. 643.

† In *Jackson v. Hurlock*, Amb. before Lord Northington, 24th of November, 1764, Sir John Hartop had, by his will given an estate to Mrs. Marsh (whom he afterwards married and made a settlement upon) subject to payment of £10,000 as he should direct in writing; and he afterwards directed it to be paid to charities: After the marriage he made a codicil affirming his will. Lord Northington held the devise revoked by the will and settlement, but re-published by the codicil, and that the charge sunk for the benefit of the devisee. In *Bland v. Wilkins*, February, 1782, lands were given to E. N. in fee, upon condition that her executors and administrators should pay £10 to a charity; Sir Thomas Sewell held the £10 should go to the heir, as part of the produce of the land undisposed of (a).

[(a) *Jackson v. Hurlock*, has been since more fully reported, 2 Eden, 263.]

SOMERVILLE

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SOMERVILLE v. CHAPMAN.

A BILL filed against the master of *St. John's* hospital, in the city of *Bath*, and against the corporation, for a renewal of a lease held of the hospital, upon payment of one year's rent, by way of fine. In 1711 an information had been filed, which came on to be heard at the Rolls: 13th Nov. 1713, the Master of the Rolls made an award, which was submitted to, and afterwards confirmed by a decree. From that time till 1738, no larger sum than £60 had ever been taken as a fine. In 1738, the estate being much improved, a doubt was entertained whether the hospital could take a larger fine without the consent of the lessee. *Jones* offered £600, and it was decreed here that they might take it. In 1753, he offered £1,000 which was refused; but Lord *Hardwicke*, 26th March, 1753, decreed that the hospital should grant a renewal, upon the payment of that sum. A new lease was granted accordingly, and *Jones* granted many under leases, with provisos to renew upon the payment of one year's rent, whenever the hospital should renew to him. By his will, 1772, he devised the estate to trustees, to certain uses, taking notice that a renewal must shortly take place. The trustees applied to the hospital, and corporation, to renew, and, being refused, brought this bill. The whole case was admitted by the answer; but the Master and Brethren insist they are not bound by the decision, and that the Court had no jurisdiction.

Bill to compel an hospital to, renew a lease upon certain terms (under two years reserved rent) dismissed.

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Mr. Mansfield for the plaintiffs.—The single question is, whether the hospital is, or is not, bound to renew, upon the payment of such fine as this Court shall think reasonable. They insist that, by the act of parliament, they cannot alienate; but this would be no alination, the 13 *Eliz.* authorises such foundations to grant leases for three lives. In considering the proportion of fines, the present situation of the estate is not to be looked at, as the improvements are in contemplation at the time of entering into the covenants. Had the court had no jurisdiction, Lord *Hardwicke* would not have entertained the petition.

Mr. Kenyon for defendants.—In the case of *Doctor's Commons v. St. Paul's**, it was held, that, though there was a contract for a renewal, the Court would not decree one.

Lord Chancellor.—What interest have the plaintiffs against the hospital by way of contract, so as to compel a renewal at such a

* The decree of Lord *King* in that case was reversed in the House of Lords, and it was ordered that the dean and chapter should grant a new lease upon the same terms, and with the same covenants (except the covenant for renewal) with the former lease. *Bettesworth v. The Dean, &c. of St. Paul's*, 3 Bro. P. C. 389. (a)

[(a) Edit. Toml. vol. i. 240.]

fine ?

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fine? The discretion is, only, that they should not increase their fines by taking *two* years rent, not to prevent their taking a year's rent, though it shall amount to more than formerly. A perpetual renewal upon particular terms would be equivalent to an alienation. The only line would be to refer it to the Master to report what the fine for admission should be. The contract with the under lessee is only that they shall be renewed when the original lease is (a).

Bill dismissed.

[(a) See the case of *Watson v. Hensworth Hospital*, 14 Ves. 324. For the cases upon covenants for perpetual re-

newal, vide *Tritton v. Foote*, post, vol. ii. p. 636, and the cases cited in the Editor's note.]

ROBINSON v. DAVISON and others.

Third mortgagee buying in the first mortgage (*pendente lite*) shall exclude the second.

IN this case the second mortgagee filed his bill against the mortgagor and the first and third mortgagees, to pay off the first mortgage, and that then the estate should be sold, his own mortgage paid, and the third be satisfied out of the remainder. Pending the suit the third mortgagee bought in the first mortgage, and the Lord Chancellor determined that by this he had obtained a priority, and should be paid his whole money before the second mortgagee. The cases cited by Mr. Madocks for the second mortgagee were, *Earl of Bristol v. Hungerford*, 2 Vern. 524. cited in *Wortley v. Birkhead*, 2 Ves. 571. and 3 Atk. 809. *March v. Lee*, 1 Ch. Ca. 162. *Brace v. The Duchess of Marlborough*, 2 P. W. 491. *Hawkins v. Taylor*, 2 Vern. 29. *Turner v. Richmond*, *ibid.* 81. * (a)

* Secus after a decree, *Wortley v. Birkhead*, cited as above.

[(a) See the case of *Belokier v. Butler*, 1 Eden, 523, affirmed in the House of Lords, 5 Bro. P. C. edit. Toml. 292, where the first mortgagee had submitted by his answer to assign to the second, and yet the third having obtained an assignment, was decreed to

hold against the first. For the cases upon the subject which are very numerous, vide Mr. Cox's note to *Brace v. The Duchess of Marlborough*, 2 P. W. 491. and Mr. Nolan's note to *Hayshaw v. Yates*, 2 Str. 240. also *Baker v. Harris*, 16 Ves. 397.]

RICHMAN

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RICHMAN v. MORGAN.

Lincoln's-Inn-Hall.

IN the marriage settlement of *John Butler* the father, there was a provision made of £8,000 each for the younger children of the marriage, with a proviso, that "if the father should in his life-time or at the time of his death, give to any of his daughters or younger sons so entitled to portions or provisions under that trust, money or lands, for or in advancement in marriage, or otherwise, the value thereof should be deducted from the portion, *unless he should by writing declare to the contrary.*" *John Butler*, senior, by his will in 1766, gave a sum of £4,000, in the funds, to his wife for life, and after her decease to his second son *John Butler*, junior, and also gave to *John* the residue of his personal estate, and made him executor of his will. *John Butler*, junior, being entitled as a younger son to the said £8,000, provided by his father's marriage settlement, had, during his father's life-time raised money by assigning the same to the plaintiff who now brought his bill to have the same raised and paid to him as assignee of *John Butler*, junior; the defendants insisted, that the provision was not to be raised, the value of the £4,000, subject to the life of the mother, and the residue amounting to more than the £8,000, and going in satisfaction thereof.

A provision by marriage-settlement, with a proviso, that sums advanced should go in satisfaction unless otherwise declared.—

£4,000 left by will, subject to the life of the mother, and the residue of the personal estate being given by the will to a child entitled to the provision under the settlement, must go in satisfaction of that provision.

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Mr. Mansfield for the plaintiff.—In order to determine whether this be, or be not, a satisfaction, we must consider the proviso, and whether the father intended it so to be. To be a satisfaction, it must be a present, not a distant, provision—this applies to the £4,000, given to the widow for life. Another thing necessary from the rules relative to satisfaction is, that it must be certain—here nothing is given to *John* by the will but the £4,000—the residue was totally uncertain. The proviso does not say *any thing* given, but only *sum or sums* of money—then it must be either a sum or sums of money, but this was neither,—the £4,000 was only a reversionary interest; neither is the residue a gift of a clear liquidated sum, nor an advancement.

Mr. Selwyn on the same side.—The question does not depend upon any clause excepting the proviso, that what should be given by the father should go in satisfaction, unless he should declare to the contrary. It is a fact agreed among us, that he hath not made any such declaration. It is not ascertained what the residue amounted to: it is stated on one side as £16,000, on the other only as £6,000. The question is, whether *Butler* could not give any bounty to his son but what would go in satisfaction, and whether the reversionary interest and the residue shall be such. If the question

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question was on the £4000 only, that could not go in satisfaction for a certain provision. Then as to the residue, I know of no case where a residue has been held to be a satisfaction. The general case of satisfaction has been upon debts, and there it has been said that the doctrine of implied satisfaction has been carried too far: *Barret v. Beckford*, 1 Ves. 519, was a stronger case than the present; until it appears that the residue was greater than the portion, the resolution there was, that the residue was no satisfaction. This is a very different case from giving a certain sum. If, by possibility, it might be less than the portion, it cannot be a satisfaction.

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Mr. *Reed* (for the assignees of *John Butler*, jun.)—This is not a case within the proviso. *John* was twenty-one, and the portion then vested. The proviso was only applicable to money, to be paid before the portions vested. As standing coupled with the executorship, and attended with other marks of bounty, it is equivalent to a declaration that it should not be a satisfaction.

Mr. *Ambler* for the defendants.—The question is, whether *John Butler*, having taken the residue, and the £4,000 is also entitled to take this £8,000. It is a general question brought on by the assignee of all the effects of *John Butler*. The intent of the deed was, that if the husband and wife should provide for the younger children, it should abate what they would have from the £8,000. In cases where the provision is, that if lands shall come to the younger children, then the portions shall not be raised, if lands come, any how, it is sufficient, and the portions sink. It was so determined in Mr. *Pelham's* case. If *John Butler* the father had died intestate, the distributive share would have been accounted as a satisfaction.—So, of *Borough English* lands descending to the youngest son. As to the £4,000 it is certain, and, if it was not, that would be no objection as to any thing but the amount, it must be still considered as a satisfaction, so far as it went: this was capable of valuation, and therefore to be considered as a sum of money. As in the case of estates tail given to an infant, they are capable of valuation.—The £4,000 is a sum of money, only differing in point of value from being reversionary. In the case of *Watson v. Lord Sondes**, it was held that an estate in

* *Watson v. Lord Sondes*, (the same case as *Pelham v. Lord Lincoln*) 9th and 10th of August, 1756. Amb. 325. The question arose upon the will of Mr. *Pelham*, who, having four daughters, appointed a sum of £10,000, over which he had a power under his marriage settlement among his daughters, excepting Lady *Lincoln* (whom he had advanced); and also gave his personal estate among his other daughters, likewise excepting Lady *Lincoln*. On the 28th of August, 1752, his daughter *Grace* married Mr. *Watson*. Mr. *Pelham* gave her £20,000, by applying part of the £10,000 and other means, for her fortune: and the question

in remainder was given in advancement; this is a clear answer to the objection of its not being immediate. Then as to the residue—I should wish the distinction should be attended to between this case, and that of an implied satisfaction of a strict debt. The Court has gone so far in the case of a debt, that where a man has given any thing that has not amounted to so much as the debt, it has been held as no satisfaction. The idea was, that a man should be just before he was generous. If the man owes £200 to *A.* and gives £300 each to *A.* and to *B.* *A.* loses his debt. The doctrine is pared away almost to nothing, for, if the residue is left it is not a satisfaction. So far as to cases of debt and implied satisfaction.—But this is the case of a portion and a declared satisfaction, for you must take the clause in the settlement together with the will. Then whatever he gives or leaves is to go in satisfaction; if there is no other declaration, the deed itself is such. Then consider how far the Court has gone upon covenants. Upon a covenant to leave the wife a certain sum, the husband dies intestate, her distributory share, amounting to more, is a satisfaction—*Blandy v. Widmore*, 1 P.W. 324. *Lee v. D'Aranda*, 1 Ves. 1. This proviso is the declaration, and the thing left has its value. If he has the value of £8,000 it is as much as he ought to have, unless the father declared he meant him to have more.—Mr. *Madocks* said, it was not meant as a saving to the estate, but it certainly was such; to say it was not meant as a satisfaction, is no argument. It does not turn upon *Butler's* intention, it depends upon the deed unless he had declared otherwise.

Lord Chancellor.—The point they argue is, that it did not take place as a gift, not being given *eo animo*. Suppose, in the case cited, he had given a sum of money upon an event, would that have been a satisfaction?

Mr. Ambler.—It is not necessary it should be a preferment, whatever bears a value is a satisfaction for so much. In Lord *Pelham's* case, the estate tail was thought capable of a computed value. The £4,000 may clearly be considered as a portion.

Lord Chancellor.—The words *for preferment* are to distinguish it from presents, &c. Then, being in possession of this argument, they say the testator could not mean it as an advancement to give him a residue or remainder.

question was, Whether the legacy, given by the will, was satisfied by the portion. Lord *Hardwicke* laid down the rule, and gave two reasons for it: 1st, That the Court leans against double portions; 2dly, That a portion is a payment of the debt of nature; therefore, being of opinion, that the gifts were by way of portion, he decreed that they were a satisfaction of the legacy; but as to the third part of the residue of the personalty, and also the real estate devised, it was not a satisfaction of those.

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Mr. *Ambler*.—Small sums given detached, to be sure, would no more be accountable for here, than in the case of hotchpot. * In *Pugh v. The Duke of Leeds*, there were two questions, one quite out of this case, the other whether the sum advanced by the father was a satisfaction; Lord *Bathurst* thought it was.

Lord *Chancellor*.—It is only if he leaves, or gives directly, and without qualification.

Mr. *Attorney-General*, same side.—It was not in the power of the father to give, he was prevented by the settlement.—This case is, in specie, new, for I remember no case where the father could declare whether he meant to give in addition. Here, it was in the discretion of the father to give in addition or not; he has omitted so to do, and nothing can supply it. The proviso was intended to prevent the questions which have arisen; the younger children were to have £8,000 a-piece, but it might be in the parent's power to give them land or money; then, in that case, no construction is to take place, but it is to be in compensation for their portions, unless it is declared otherwise. Whether the provision were immediate or more remote, being of value, that value was to be computed. This is not to extend to ornaments or matters of that

* *Pugh and his wife v. The Duke of Leeds and others*, in the house of lords, 15th March, 1780 (a).

By settlement on the marriage of *Godolphin Edwards* and *Elizabeth Mares*, dated 23d and 24th April, 1724, int. al. a term of 600 years was created to raise portions for daughters, by which it was provided, that, in case there should be but one daughter, the sum of £5,000 should be raised for such only daughter, to be paid at 18, or day of marriage, with maintenance in the meanwhile. And there was a proviso in the settlement, that, in case the daughters should be advanced, with portions in money or lands, equal in value to the portions thereby provided, in the life-time of *Godolphin Edwards*, or he should give or leave them money or lands not equal in value, the trustees should raise only so much as would make the money, or value of the lands so given, equal to the portions provided.—*Elizabeth* the appellant, being the only daughter of the marriage, attained 18 the 4th December, 1746. *Godolphin Edwards* being possessed of £5,300 *East-India* annuities (which he had saved from the income of the estate), 21st October, 1772, transferred them to the appellant *Elizabeth*, then the widow of Mr. *Manlove*. A bill had been filed, and the cause came on to be heard before Lord *Bathurst*, 25th June, 1776, in which there was a decree in favour of the appellant for her portion of £5,000 the present question not being then before the Court. The respondents afterwards exhibited their bill of review, stating, that, since the pronouncing the decree in that cause, they had discovered that *Godolphin Edwards* had transferred to the appellant these *India* annuities, in part of her portion. The cause came on 10th December, 1777, to be heard upon the bill of review, when Lord *Chancellor* declared that the £5,300 *East-India* annuities, transferred by *Godolphin Edwards* to the appellant *Elizabeth*, were to be considered as having been so transferred in part satisfaction of her portion of £5,000 under the marriage settlement, and therefore varied the former decree so far, upon which the present appeal was brought in parliament, which being heard March 15th, 1780, it was ordered that the same should be dismissed, and the decrees therein complained of affirmed. Vide *Beves v. Ponset*, Finch's Prec. Chan. 240, and *Farnham v. Philips*, 2 Atk. 215,

[(a) 6 Bro. P. C. edit. Toml. 125.]

kind,

kind, plate, jewels, pictures, though of value. The residue is only uncertain until it appears what it is. A value may be put upon the £4,000. This case stands on more peculiar circumstances than the *Duke of Leeds v. Pugh*, or the common cases. The father might have declared to the contrary; he not having done so, the law of the settlement takes place.—I admit he has not given £4,000 but something less, because there was a life upon it; but, not being upon a contingency, it is easily computed, and the value is a value in money. It is only a question before the Master what the value is.

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Mr. Wooddeson, on the same side, cited *Pelham v. Lord Lincoln*, Amb. 325, and *Saville v. Saville*, 2 Atk. 458.

Lord Chancellor.—The proper way now, will be to send it to the Master, to see what he took under the will, and the value of it at the time of the testator's death, and to reserve all further considerations. The residue, I think, must be in satisfaction, there will be no arguing that, and I am afraid the £4,000 must be valued in the same manner, which would cover the whole. Where a man leaves a residue he means the money it will produce. It is impossible to say the £4,000 after the death of the wife, would not be an advancement. It strikes me very strong that this is a provision, and that under the words *in marriage or otherwise*, it must be so considered*.

* Vide post, vol. ii. p. 338 and 394. Lord Chancellor's judgment in this cause (a).

[(a) Vide also *Haynes v. Mico*, post, 129, in the Editor's note to which the subsequent cases are referred to.]

BOARDMAN v. MOSMAN.

Lincoln's Inn-
Hall, 16th July.

BILL, to replace money raised by the sale of the plaintiff's property in the funds, by the trustee, and for the appointment of new trustees. The only question was, whether *Kyme*, one of the trustees in the deed, but who had never executed it, or formally accepted the trust, was liable, *Mosman*, the other trustee, (brother to the plaintiff, a widow) sold the stock, but *Kyme* knew of it, and concealed it from the plaintiff, and advanced her £500, which she said she borrowed, rather than sell out any of the funds (*Kyme* knowing that they were then sold), and the money came to the use of him and his partner, who had since failed. And Lord Chancellor held him equally liable with *Mosman* (a).

One trustee knowing and concealing his co-trustee's having sold out the trust fund, equally liable with the trustee who actually sold.

[(a) Vide *Hovey v. Blakeman*, 4 Ves. 596. *Chambers v. Minchin*, 7 Ves. 186. *French v. Hobson*, 9 Ves. 103. As to the distinction between trustees and exe-

cutors, vide *Sudler v. Hobbs*, post, vol. ii. 114. *Scurfield v. Howes*, post, vol. iii. 90.]

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Lincoln's Inn
Hall, 24th July,

SCOTT v. FENHOULLET (a).

(b) Rehearing.

Purchase of the fee-simple in the name of the purchaser, and of terms in the name of a trustee, (with an intervening reversion in the vendors), upon which rents were reserved in favour of other persons; held that the terms are terms in gross, not attendant upon the inheritance, the purchaser not having substantially the whole beneficial interest, and having made no express declaration that they should be attendant upon the inheritance (c).

LORD Chancellor gave judgment.—The question is, whether the terms in this case are terms in gross, or to attend the inheritance, which was purchased at the same time. Sir *Andrew Chadwick* meant to purchase the whole interest, he did not mean to purchase with an intervention of eleven days. All the material facts are these: In 1699, Sir *Benjamin Madox* seised in fee of three acres of lands, part of which are the premises in question, leased to *Glascock* for fifty years, which would expire in 1748. In 1714, he granted a further lease to the assignees of *Glascock* for 49 years, to commence in 1748. He devised the estate in fee (the terms being outstanding in the trustee) to *M. Rudyard*, who afterward married *Edward Fitzgerald* (d). In 1772 Lady *Madox* (surviving

[(a) This cause, in which several points were made, the statement of which is at great length in the Register's book, B. 1771, fol. 347, came on originally on the 29th and 30th April, 1771, before Lord Bathurst; it now came on the 23d and 24th July, 1778, upon a rehearing as to this point only, Reg. Lib. B. 1778, fol. 573.]

[(b) This rehearing was, in consequence of the opinion of Mr. *Fearne*, printed in 2 Collect. Jurid. 297, in which the doctrine upon this subject is very ably stated. It is however founded in a great measure, upon a fact on which Mr. *Fearne* was mis-informed, viz. that the rents reserved by the trustees upon the terms granted by them to Sir *A. Chadwick*, had been afterwards purchased by him, so that no beneficial interest remained in the reversion reserved upon them.]

[(c) The words in the marginal note printed in italics, are inserted in the present edition, for which alteration, vide the note at the end of the case.]

[(d) The following statement, taken from the Register's book, ought here to be inserted, as necessary to make the case intelligible:—"Dame *Dorothy Madox*, by her will, dated the 13th of April, 1723, after reciting the leases, and that they were vested in *Marmaduke Allington* and *Thomas Madox*, in trust for her, directed that the

said *Marmaduke Allington* and *Thomas Madox*, should stand possessed of the said leasehold lands, and premises, upon trust to pay the clear rents and profits to her grand-daughter *Mary Fitzgerald*, exclusive of the said *Edward Fitzgerald*, and also directed that the said *Marmaduke Allington* and *Thomas Madox*, their executors, administrators, and assigns, by fines to be taken on leases to be granted by them of the said leasehold premises in reversion yearly, during the life of the said *Mary Fitzgerald* and *Edward Fitzgerald*, and until the commencement of the said fifty years term raise £100 a year, for the sole use of the said *Mary Fitzgerald*, during the life of the said *Edward Fitzgerald*, &c. for which she willed that her said trustees, their executors, administrators, or assigns, should yearly, during the life of the said *Mary Fitzgerald*, before and until the commencement of the said fifty years term, by indentures, whereunto the said *Mary Fitzgerald*, should be a party, lease in reversion for the best fines that could be gotten for the same, all or any of the said leasehold premises, for any term less than the term granted by the original indentures of lease, so as upon every such lease there was made payable such yearly rent and rents as should bear an equal proportion as near

(surviving Sir *B.* and being entitled to the beneficial interest in the terms) bequeathed the terms to *M. Rudyard* (who was entitled to the reversion in fee of the estate) for life, remainder to raise portions for children, with a proviso that the trustees should, between 1722, or the death of Lady *Madox*, and 1748, when the trust would come into possession, raise £100 *per ann.* for ——— *Rudyard* during her coverture, but if she should become non-covert, then £200 *per ann.* till she should come into possession. The question arises on the execution of this trust. Sir *Andrew Chadwick*, 18th June, 1729, purchased of *Mary Rudyard*, then *Mary Fitzgerald*, the fee-simple estate, and so much of the terms as related to it, and the trustees executed their power by granting a derivative lease to trustees for Sir *Andrew*, with a nominal reversion (eleven days) to themselves. On the same day, they executed their power on the second lease also, with a nominal reversion. In that lease it was thought proper, to declare the intent of conveying it to trustees, to be in order that it might not merge.—This was a mistake: but it strongly shews his intent that the terms should attend the inheritance. He purchased three other estates in the same manner, except that there he purchased the leases in his own name, and the fee-simple in the name of trustees. The question stands on the plain ground of his having so purchased one in his own name, the other in the name of trustees, whether these terms are in gross or to attend the inheritance. Every term standing out is, at law, a term in gross. If it is different in equity, it must be by affecting the person holding the term with a trust to attend the inheritance. This may be by two ways. By express declaration, —and then, whether the trust would or would not merge, and whether the reversion be real or only nominal, it must be attendant upon the inheritance. Here it is not upon express declaration, then it must arise from implication of law, founded on the statute of frauds, which forbids any trust, except by writing or by implication of law. As, if an estate be purchased with my money, it is in trust for me by implication of law, and is out of the statute. Where one is seised in fee-simple, and there is a term outstanding to the use of the person seised in fee-simple, it is the property of the person so seised in fee-simple. *Best v. Stampford*, Pr. Ch. 252; also in *Freeman and Salkeld*, lays down that where if in the same hand it would merge, there it must attend the inheritance. An attempt has been made to make a difference from the cases of *Whitchurch v. Whitchurch*, and *Baden v. Lord Pembroke*. In *Whitchurch v. Whitchurch*, (2 P. W. 236.) it was not a future term but an immediate one, and the term did not merge, there

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near as might be to the said reserved rents of £20 a year, and so as the rent reserved in every such lease, should continue during such lease,

incident to the reversion of the said premises remaining in the lessors thereof,"]

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being an intermediate term. Another circumstance which makes that case immaterial is, that *Whitchurch* had purchased the inheritance and then had the whole interest, both the terms were his, and there was no interest outstanding except in form. There was no argument on that part of the case, for it was taken for granted the terms were to attend the inheritance; the only question was, whether a will capable of passing a chattel interest, divided the terms from the fee-simple. In *Baden v. Lord Pembroke*, 2 Vern. 52, Lord *Pembroke* demised for ninety-nine years, upon an express trust, to re-demise to him under a pepper-corn rent for his own life, a rent, by way of jointure, for the Countess during her life, and a pepper-corn rent during the remainder of the term.—Lord *Pembroke* was entitled to the whole interest, the uses being exhausted; and there was no question as to its being, in its own nature, a trust to attend the inheritance. The bill was filed on the idea that the term was assets, and even in a case where it was held that such a term was assets, it was held to be the \* heir's after payment of the debts. These cases do not carry the law of the Court an iota beyond what it went to before. A trust arises from the circumstance of the interest belonging to the owner of the inheritance. Sir *Andrew Chadwick* might have given these terms to a stranger, and if the inheritance descended, the heir at law might demand the rents reserved by the leases. It is said to be extremely plain that Sir *Andrew Chadwick* meant to consolidate the interests: this is begging the question. It is true he meant to take the largest interest he could, but by no means apparent that he meant to consolidate the interests. I lay no stress on the days of the reversion, for it was meant only as a nominal reversion, during that time, the rent would be to the original lessees—but they did not mean to reserve a substantial interest. It would be necessary there should be an express trust, to make this attendant on the inheritance; the transaction does not supply a necessary construction of law. It is a very nice and a very new point, whether the intent to purchase the whole interest, is sufficient to make the term attendant upon the inheritance. The impossibility he was under of purchasing the whole rendered an express declaration necessary, to make it attend the inheritance (a).

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Decree affirmed.

\* Perhaps *Chapman v. Bond*, 1 Vern. 118.

[(a) It has long been established, that where the same person has the inheritance and the term in himself, though he has in one the equitable interest, and the legal estate in the other, the

inheritance draws to itself the term, and makes that attendant upon it. *Whitchurch v. Whitchurch*, cited p. 70. *Goodright v. Sales*, 2 Wils. 329. Mr. Butler's note to Co. Litt. 290 b. C<sub>ap</sub> p<sub>et</sub>

## MICHAELMAS TERM.

20 GEO. III. 1799.

## (i) BOTELER v. ALLINGTON.

**A** BILL filed by plaintiff, who had contracted for the sale of the estate in question, against *Henry Allington*, the representative of the surviving trustee in the original will, and also devisee of the reversioner in that will, for a conveyance of the legal estate. Subsequent to devises in the original will, which never took effect, stood the following remainder; “ *to testator’s cousin, John Boteler for life, remainder to Marmaduke and William Allington and their heirs, during the life of John Boteler, to preserve contingent remainders, remainder to Philip Boteler the son of John Boteler, for life; and from and after the determination of that estate by forfeiture or otherwise, in the life of Philip, to the defendants Marmaduke and William Allington*”

Recovery will bar equitable estates tail.

(i) *Brydges v. Brydges*, 3 Ves. 120.

*pel v. Girdler*, 9 Ves. 509. The incorrect mode in which the present case is here reported has caused considerable difficulty: As the statement does not contain the very important fact that rents were reserved by the leases granted by the trustees, and the usual covenants entered into by Sir *A. Chadwick*, and that the trustees were restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants. It has frequently been supposed, that the ground of the decree was the circumstance of the existence of the reversion, which the purchaser could not get in; and much perplexity has arisen from the obvious inconsistency of the two passages in the text which are printed in italics. Mr. *Sugden*, however, to whose talents and industry the profession are so much indebted, has, by means of the above circumstances, as suggested to him probably by the opinion of Mr. *Fearn*, removed the difficulty and reconciled every part of the judgment. Lord *Thurlow* must therefore be considered as having

stated his opinion, that the reversion of itself, was immaterial, but that the rents reserved by the leases, rendered an express declaration necessary to make the terms attend the inheritance. That very able writer has stated the points established by the present case, as follows: That if a purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a reversion of a few days, be left outstanding; so much of the term as is assigned to a trustee for the purchaser, will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favor of other persons, whereby the purchaser has not *substantially* the whole *beneficial* interest in the estate, there an express declaration is necessary to make the term attendant; the mere intent of the purchaser to purchase the whole interest, and that the term should attend the inheritance, will not vary the case. *Sugd. Vend. and Purch.* 382, et seq.]

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" and their heirs, to preserve contingent remainders (in the usual form, except that in this devise, the words 'during the life of Philip Boteler' were omitted), (a) and from and after the decease of Philip to the use of the first and other sons of Philip in tail male, remainder to the right heirs of the testator in fee." The testator died, leaving Neville his sister and heir at law. *Marmaduke Allington* survived *William*, and devised all his trust estates to *Thomas Buck* (since deceased) and *Henry Allington* (the defendant) upon trust to perform the original trusts. Mrs. *Neville* the sister and heir at law of the testator, devised her reversion in fee (subject to some devises which took no effect) to defendant *Henry Allington* in tail. She died in 1744, so that *Henry Allington* the defendant had in him the trust estate, if subsisting under the original will, and the reversion from Mrs. *Neville*. *Philip Boteler*, first son of the first *Philip Boteler*, in 1774 suffered a recovery; and, upon a contract for the sale of the estate, a doubt arose whether a title could be made without *Allington's* joining, on the idea, that, from the omission of the words "during the life of *Philip*," the trustees took a fee, and that that legal estate united with the equitable estate derived from Mrs. *Neville* would not be barred by *Philip's* recovery.

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Mr. *Attorney-General* and Mr. *Kenyon* for the plaintiff argued, 1st, That the intention of the testator being to give the estate to the trustees, only for the purpose of preserving the contingent estates from being defeated, which could only happen during the life of *Philip Boteler*, made the devise equivalent to a gift to them only for his life—That the trustee, stating himself only to be such, ought to do what becomes that character. 2dly, That supposing these all to be equitable estates in *Philip Boteler*, with an equitable reversion, they were barable by the recovery, and for this

[(a) There seems considerable doubt in this case, what estate the trustees took; it is stated in the argument of *Doe, d. Compere v. Hicks*, 7 T. R. 435, that Lord *Thurlow's* private opinion was, that the trustees had not the legal estate, and that the conveyance was decreed, *ex majori cautela*, and not from any doubt of his Lordship's. Lord *Kenyon* also observed, that the case ought not to be relied on, as it was an amicable suit, and the bill was filed to remove all doubts. Lord *Eldon* has, on the other hand, observed, that the case received great consideration, both from the bar and the bench, (*Wykham v. Wykham*, 18 Ves. 418) but it is probable that his Lordship there alluded to the doubt as to the validity of equitable recoveries;

the doctrine respecting them, not being at that time so clearly settled as it is at present; whereas Lord *Kenyon* was solely considering what estate the trustees took, a question which, both from what is above quoted, and also from the observations of Lord *Almonley*, in *Philips v. Brydges*, 3 Ves. 128, appears to have received but little consideration from the Court. It is probable, both from the decision in *Doe, d. Compere v. Hicks*, and from expressions that have fallen from the Court, on other occasions, that the trustees would not now, under such a devise, be considered as taking the legal fee. *Doe, d. White v. Simpson*, 5 East, 162. *Doe, d. Leach v. Micklem*, 6 East, 493. *Wykham v. Wykham*, 11 East, 473.]

they

they cited *Robinson v. Comyns*, For. 164. *Salvin v. Thornton**, at the *Rolls*, Trin. 6 Geo. 3.—that equitable estates with equitable remainders, are barred by recovery.

Lord Chancellor.—In that case the equitable estate for life and the legal remainder were in the son; but supposing all the estates to be equitable, with an equitable reversion, there is no doubt the recovery will bar.—The trustee is bound to do every act in assistance of the equitable tenant in tail. I see no reason why he should not be able to oblige the person having the legal estate to join. Why should the tenant of the legal estate be exempted in conscience from joining in such conveyance?—You have a right to have a legal estate conveyed to you, upon which to suffer a recovery.

The defendants acquiescing, his Lordship decreed a conveyance by *Henry Allington*, to the eldest son of *Philip Boteler* in tail male, with the remainders over in the will (b).

* *Salvin v. Thornton* (a).—*John Thornton*, seized of the premises for life, with remainder to his first son, *Thomas*, in tail male, remainder to his second son *James* in tail male, remainder to himself in fee, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by *Kenneth Mackenzie* in trust for *Thomas* (the tenant in tail) *Thomas*, thus having the equitable estate for the life of his father, (the legal estate being in the trustee) and the legal estate tail, in remainder, suffered a recovery, and soon after died, leaving issue a daughter, wife to plaintiff. *James*, the second son, took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested), and died, leaving two daughters, the defendants, who were in possession. The bill was filed by *Salvin* in right of his wife, for an account of profits, and to have the estate delivered up. Upon hearing at the *Rolls*, the great question in the cause was, whether the recovery suffered by *Thomas*, who had an equitable estate for life, and a legal estate tail, in remainder, was capable of barring the legal remainder: and upon very full argument these points were laid down by his Honor, and seemed to be the sense of the whole bar. 1st. That a recovery may be suffered of an equitable estate. 2dly. That such a recovery can only affect equitable remainders. 3dly. That a recovery of an equitable estate must, in all respects, imitate a legal recovery, and therefore that the person suffering an equitable recovery must have such an equitable estate as, had it been a legal estate, would have enabled him to suffer a legal recovery. 4thly. That an equitable estate cannot, in suffering a recovery, be blended with a legal estate. 5thly. That as the recoveries suffered of those different estates are perfectly distinct from each other, a recovery of either estate shall not affect the other, the recoveree of the legal estate being always the trustee of the possessor of the equitable estate, and the recoveree of the equitable estate becoming always the *cestui que trust* of him who has the legal estate. Upon this doctrine, therefore, the bill was retained for a year, with liberty for the plaintiff *Salvin* to try the validity of the recovery of *Thomas*, at law. But it was the opinion of the Court, that, as *Thomas* had not such an estate as would have enabled him to suffer a perfect legal, nor a perfect equitable, recovery, that it was totally invalid.

[(a) Amb. 545].

[(b) The whole doctrine respecting equitable recoveries is contained in the very learned and admirable opinions of Lord Eldon, when Solicitor-General, Mr. Madocks, and Mr. Fearne, upon the validities of the recoveries

suffered by the Marquess of Bath, 1 Collect. Jurid. 214. See also *Brydges v. Brydges*, 3 Ves. 120. *Lord Grenville v. Blyth*, 16 Ves. 924, and the observations of Lord Eldon in *Wykham v. Wykham*, 18 Ves. 418.]

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HILARY TERM.

20 GEO. III. 1780.

Earl of HARRINGTON v. FLEMMING.

When money is to be laid out, under a marriage settlement, in purchases, application must be made to the Court, upon each separate purchase.

UNDER a decree for money to be laid out in purchases, to be settled to uses under the marriage settlement of Lord *Harrington* and Miss *Flemming*, Mr. *Mitford* moved, last term, that the parties might be at liberty to propose purchases to the Master, from time to time, without applying upon each purchase to the Court, and cited *Neale v. Neale*, in 1728, and *Ormston v. Lord Maynard* before Lord *Camden*, in both which cases such an order had been made.

Lord *Chancellor* thought application ought to be made upon each purchase to the Court, but said he would look into the cases. On the first day of this term, Lord *Chancellor* said,—It is more for the advantage of the suitor, as a general case, that the shape of each proposal should be laid before the Court. It is fit, before the proposition goes to the Master at all, that the Court should see there is a subject proper for his consideration, together with the state of the family. Without prejudice to any opinion upon particular circumstances in a decree, but as a general subject only, I think the proposal ought to be made to the Court.

Motion denied. The *Master of the Rolls*, who was present, expressed his assent to Lord *Chancellor's* opinion.

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SHAPLAND v. SMITH.

Lincoln's Inn-Hall, January 18.

Mr. Baron *Eyre*, for Lord *Chancellor*, Masters *Holford*, and *Hett*.

Devise to trustees to pay out of rents and profits (after deducting rates, taxes, and repairs) the residue to C. S. and his assigns for life, and, after his decease, to the use of the heirs male of the body of C. S. and in default of such issue, remainder over, not an estate tail in C. S. the use not being executed in him.

UPON exceptions to the Master's report, in favour of a title depending on the validity of the recovery suffered by *Christopher Shapland*, under the following case:—*Shapland* devised “to *John Brett*, *John Shapland*, and *George Shapland*, the premises in question, upon trust, that they the said J. B., J. S. and G. S. and their heirs and assigns, shall, yearly and every year, by equal quarterly payments, by and out of the rents and profits of the said premises, after deducting rates, taxes, repairs, and expences, pay such clear sum as shall then remain to my brother *Christopher*

of the heirs male of the body of C. S. and in default of such issue, remainder over, not an estate tail in C. S. the use not being executed in him.

Shapland,

Shapland, and his assigns, during his natural life, and from and after his decease, *to the use* and behoof of the heirs male of the body of the said *Christopher Shapland*, lawfully to be begotten, as they shall be in priority of birth; and in default of such issue" remainder over. Cases cited, *Tipping v. Cozens*, Carth. 272. 1 *Ld. Raym.* 33. *Brown v. Barkham*, Pre. Ch. 461. *Broughton v. Langley*, Eq. Ab. 383. *Salvin v. Thornton*, Trin. 1766 (ante, p. 73. note) *Pigot v. Garnish*, Cro. Eliz. 678. *Jones v. Lord Say and Seale*, Eq. Ab. 383. 8 *Vin.* 262. 3 *Bro. P. C.* 458. *South v. Allen*, 1 *Salk.* 228(a).

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Baron *Eyre*.—A devise to trustees to permit *A.* to receive or to pay profits to *A.* amounts to a disposition of the land. What difference is there here? The rule of law is, *A.* having the use of the estate, the trust shall not be separated from the land, and the use shall be executed in him; this is an estate tail in the first taker, and he hath a right to sell the estate.

Master *Holford* expressed himself of the same opinion.

Master *Hett* asked if his opinion was of any consequence; if so, *his* was *against* the doctrine laid down.

Baron *Eyre* seeming doubtful whether it was necessary the opinion of the Masters sitting with a judge must concur with his, in order to found a decree, the cause stood over to be reheard by *Lord Chancellor**. Upon being reheard, *Lord Chancellor* was of opinion with Master *Hett*, that the trustees, being to pay the taxes and repairs (*b*), must have an interest in the premises, that, therefore, the legal estate for the life of *Christopher* was in them (*c*),
and

* See *Merreit v. Eastwick*, 1 *Vern.* 265, and the advertisement prefixed to the 2d vol. of *Vernon*.

[(a) There wrong, but right in 5 *Mod.* 103, and so cited in 2 *Ld. Raym.* 877. (Serj. *Hill*).]

[(b) Even with this circumstance the use could not have been executed, 2 *T. R.* 450. (Serj. *Hill*).]

[(c) See the case of *Carwardine v. Carwardine*, 1 *Eden*, 36. Where the limitation is to trustees and their heirs in trust to receive the rents and profits and pay them over to *A.* the use is not executed in *A.* by the statute, but where the limitation is to trustees and their heirs, in trust to permit and suffer *A.* to receive the rents and profits there, the use is executed in *A.* *Simpson v. Turner*, 1 *Eq. Ab.* 584. *Broughton v. Langley*, 2 *Salk.* 679. *Jones v. Lord Say and Sele*,

8 *Vin. Ab.* 262. Et vide Serj. *Williams's* note to *Jeffreson v. Moreton*, 2 *Saund.* 11, and the cases there cited. In *Doe v. Biggs*, 2 *Taunt.* 109, Sir *Jas. Mansfield* observed, it is miraculous how this distinction has been established, for good sense requires, that in both cases it should equally be a trust, and that the estate should be executed in the trustee. It was, however, recognized and acted upon in that case and in several others. *Baily v. Ekins*, 7 *Ves.* 322. *Wagstaff v. Smith*, 9 *Ves.* 524, 525. *Brydges v. Woolton*, 1 *Ves. & Bea.* 137. But where there is something to be done by the trustees, which makes it necessary for them to have the legal estate, such as the payment of the debts of the testator, of rates and

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and he had only an equitable estate for life, and, the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail, which could not unite, and, of course, there could not be a good tenant to the *præcipe*, and the recovery suffered was void. It being necessary, in order to make a good tenant to the *præcipe*, that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail; but said that if it was only doubtful, he would not oblige the purchaser to take the title (a).

Exception allowed.

and taxes, of repairs or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. *Gibson v. Rogers*, Amb. 93. *Bagshaw v. Spencer*, 1 Ves. 143. 2 Atk. 246. 1 Collect. Jurid. 378. *Roberts v. Dixwell*, 2 Ves. 646. *Wright v. Pearson*, 1 Eden, 119. Amb. 358. *Silvester v. Wilson*, 2 T. R. 444. *Kenrick v. Beauchamp*, 3 Bos. & Pul. 175. *Gregory v. Henderson*, 4 Taunt. 772. Or where the intention of the testator is collected by a provision made in order to secure *femes covert* a separate allow-

ance, free from the control of the husbands, to effectuate which it is necessary that the trustee should take an estate with the use executed, which is observed by Sir James Mansfield, 2 Taunt. 111, to have been the true ground of the decision in *Jones v. Lord Say and Sele*. Et vide *Nevil v. Saunders*, 2 Vern. 415. *Harton v. Harton*, 9 East. 653.]

[(a) As to compelling a purchaser to take a doubtful title, vide *Cowper v. Denne*, post, vol. iv. 80, and the cases cited in the note.]

Sir Thomas Sewell,
Rolls, 2d March.

Bequest of leasehold ground rents, passes not the reserved rent only, but the reversionary leasehold interest.

KAYE v. LAXON and others.

WILLIAM Mantle, possessed of a leasehold estate held for ninety-nine years, of which under leases had been let by him for sixty-three years, and, in some parts of the premises, reversionary leases of nineteen years more, by his will, dated 27th November, 1770, made the following bequest: "I give and bequeath unto my grandson George Kaye (the plaintiff) my leasehold ground rents in *Swallow-street* and *Orange-street*" (the premises, the reversion of which was in question), and made the plaintiff, and some of the defendants residuary legatees. Plaintiff, thinking himself entitled under this will to the reversionary term, which was in the testator, after the expiration of the several leases, as well as to the rents reserved, entered into contracts with *Richard Laxon*, [the husband and testator of] (a) one of the defendants, for the sale of the whole; but, he objecting to the title, on the presumption that the reserved rents only, and not the estate itself had passed, refused to complete the contracts unless the residuary legatees would join in the conveyance, which some of them re-

[(a) The words struck out seem inserted by mistake, and are not in a case stating this case before me, Aug.

1787, arising on the will and codicil of *Peregrine Cust*, Esq. (Serj. Hill).]

fusing,

facing, the bill was filed. On behalf of the plaintiff, were cited *Kerry v. Derrick*, Moore 771. Cro. Jac. 104. cited in 2 Vern. 400. as *Cherry v. Dethick*. *Maundy v. Maundy*, 2 Str. 1020. Annals 142. S. C. And determined by his Honor, that the whole interest passed to the plaintiff. He therefore decreed a specific performance, without costs on either side (a).

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[(a) Vide *Philips v. Chamberlayne*, 4 Ves. 51.]

EASTER TERM.

[77]

30 GEO. III. 1780.

BROADMEAD v. WOOD.

BULL, by marriage articles, had a power to appoint the sum of £800 (to raise which a term was carved out) for younger children after the death of the wife; but it was "provided" by the power, "that the eldest son, or the son possessing the estate, should have no share of the £800." He had an eldest son *John*, a second *Anthony*, and five other younger children, and appointed the £800 to *Anthony*, and the other younger children by name. After the appointment, and before the death of the mother, *John* died, whereby *Anthony* became an eldest son, and the estate charged with the sum descended upon him. And the question was between the other younger children, and the representatives of *Anthony* (he being since dead), whether he was entitled to any share of this £800.

Under a power to appoint a sum of money among younger children, but that the eldest son, or the son possessing the estate, shall have no part of the money, a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power whilst he was a younger son.

Mr. Kenyon (for the other younger children) cited *Hodges v. Fowler*, 1766 (a).—*Randal v. Metcalf*, 6 Bro. P. C. 559 (b). and *Chelmondeley v. Meyrick* (c), before Lord Northington; where there being a term of 300 years, for raising a sum of £6,000 for younger children, in such shares as the father should appoint, but, in default of appointment, at 21, or marriage, if the father should be then dead, otherwise, immediately after his decease. *Mrs. Meyrick*, one of the children, dying in the life-time of the father; upon the question whether the portion was transmissible, it was

[(a) S. C. 11 Serj. Hill, MSS. 346.]

[(b) S. C. 21 Serj. Hill, MSS. 17.]

[(c) See this case reported, 1 Eden, 77, in the note to which all the sub-

sequent cases are collected and considered. See also *Woodcock v. The Duke of Dorset*, post, vol. iii. 569.]

held,

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 v.  
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held, that it vested at 21, or marriage, though not payable till after the death of the father; the power of appointment suspending the payment only, not the vesture of the portion. If the younger son here took after the eldest *per formam doni* he would not answer the description of a younger child. He cited also *Chadwick v. Dolman*, 2 Vern. 528. *Teynham v. Webb*, 2 Ves. 198, that a younger son so becoming eldest, could not take as a younger child.

Mr. Selwyn, for the representatives of *Anthony*.—The father had a power over the shares, though confined as to the objects. By his will he has given to the younger children, and, among the rest, to *Anthony* by name. In *Jermyn v. Fellows*, (For. 93.) it was held, that where the younger child is appointed by name, he shall take though he becomes an eldest son (a).

Lord Chancellor.—It must be divided among all the children, except *John* and *Anthony*\* (b).

\* See the case of *Nicholls v. Sheffield*, post, vol. ii. p. 215, and *Willis v. Willis*, 3 Ves. 51, S. P. Vide also *Loder v. Loder*, 2 Ves. 531.

[(a) The distinction in the case of *Jermyn v. Fellows*, was, that the child was included by name in the power, and therefore continued an object of it, though he lost his character of younger son, Sugd. on Pow. 507.]

[(b) See the cases of the *Earl of*

*Northumberland v. Earl of Egremont*, 1 Eden, 435. *Lady Lincoln v. Pelham*, 10 Ves. 166. *Bowles v. Bowles*, ibid. 177. *Leake v. Leake*, ibid. 477, and the observations of Lord Manners, in *Savage v. Carrol*, 1 Ba. & Be. 265.]

Sir Thomas Sewell,  
 Master of the  
 Rolls, for Lord  
 Chancellor.

Motion to discharge a demurrer (after motion for time to plead, answer, or demur, but not to demur alone) granted, the answer only denying combination.

### LEE v. PASCOE.

MR. Selwyn moved to discharge a demurrer, the defendant having, (after a motion for time to plead, answer, or demur), by way of answer, only denied combination, and by this means not having complied with the orders for time, which were not to demur alone. He cited *Steventon v. Gardiner*, 2 P. W. 286, and a bill filed by Sir John Dinely Goodyer against the Dean and Chapter of *Worcester* in 1777, in the Exchequer. His Honor, on authority of these cases, and that the defendants had not complied with the terms of the order, ordered the demurrer to be discharged, and taken off the file, with costs\* (a).

\* And it seems that the motion and order must be special to *plead, answer, or demur*, for if it be only to answer, although a plea will satisfy the order (vide *Roberts v. Hartley*, ante, p. 56.) yet a demurrer (although only to part) and answer to the other part will not. See *Kenrick v. Clayton*, post, vol. ii. p. 214.

[(a) See *Lansdown v. Elderton*, 8 Ves. 526, *Wetherhead v. Blackburn*, 2 Ves. & Bea. 123, that a mere denial of

combination does not satisfy the undertaking not to demur alone.]

TURNER

1780.

## TURNER v. HUSLER.

Mr. Baron Eyre,  
for Lord Chancellor.

THE testator being seised of tithes in fee, and also having leases of tithes perpetually renewable, without fine, devised all his lands, tenements, *tithes*, &c. to the defendant.—The defendant being in possession under the devise, the plaintiff, the personal representative, filed this bill for the leasehold tithes, insisting that by the will the freehold tithes only passed.

Testator having  
*tithes in fee*, and  
likewise *tithes by*  
*leases* perpetually  
renewable, de-  
vised all his lands,  
tenements, and  
*tithes*, to defend-  
ant, the *leasehold*  
*tithes* pass as well  
as the *freehold*.

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Mr. Baron Eyre.—The case of *Rose v. Bartlet* (Cro. Car. 203. 8 Vi. 202.) that if one having freehold lands and leases for years, devise all his lands, the freehold lands will only pass has been often referred to and acknowledged\*. One cannot but respect a case so supported: yet one cannot help asking why, by so general an expression, all the lands should not pass? No reason is given in the cases, there is none arising from the favour shewn to an heir at law: for the ordinary or next of kin are not considered in that light.—There is none from general rules of construction. If the words are the same, and the testator has only one interest, that will pass; if he has different interests, the intent seems to be the same, why should not the whole pass? There is but little reason in saying, that the freehold satisfies the words. By the case of *Goodtitle*, on demise of *Paul v. Paul*, 2 Bur. 1089, general words are not to be restrained, unless the Court sees abundant reason to think the testator meant to use them in a restrained sense. There is no good reason, where there is freehold and leasehold, why the freehold only should pass, I cannot see why both should not pass.—The words are large enough. The determination of *Rose v. Bartlet*, was very early: I am led to think the old idea of the dignity of the freehold, and small value of the *interesse termini*, led to it. The leaseholder was held to be a mere pernor of the profits. From the change of circumstances, the rule is now become unsatisfactory. We are, here, considering the intent of a testator. It is a degree of strictness inconsistent with the present state of things, to say that a man by his lands does not mean all (a). I do not mean to

\* Particularly by Lord Hardwicke, in *Chapman v. Hart*, Ves. 271, where the testator having freehold estates near *Fowey*, made a will, by which he devised all his lands and tenements near *Fowey*, but the will was not attested in the manner directed by the statute of frauds. Lord Hardwicke refused an enquiry, whether the testator had leaseholds near *Fowey*; because if it should come out that he had leaseholds there as well as freeholds, the plaintiff (the devisee) could take nothing, for the freeholds only would pass. Lord Hardwicke (according to a manuscript note the reporter has seen of that case) expressly declared he held the case of *Rose v. Bartlet*, (which he referred to for this opposition) to be good law.

[(a) Vide similar observations of Lord Northampton, in *Louth v. Car*endish, 1 Eden, 110, and Lord Eldon's remarks upon them cited in the note.]

deny

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 v.
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deny the authority of *Rose v. Bartlet*, but I cannot build upon it, and take the construction for tithes here, that is applied there to lands. I am not prepared to say, that the word *tithes* will not pass the leasehold, as well as freehold. Mr. *Attorney-General* added the case of freehold and copyhold lands, that the Court will not supply a surrender of the copyhold, where a charge is upon *all the lands*. That is because the will has, in law, no effect upon the copyhold, and the court of equity does not see a sufficient intent to charge it. It goes there on the intent, and I think it should do so here, and I can see no doubt of the intent. The form here is a lease, but, being renewable, it was as much the testator's as his inheritance. The case of *Addis v. Clement*, 2 P. W. 466, was argued from the intent. The limitations here are fit for an estate of inheritance. I infer from this, that the power of renewal had made the testator forget that he had not the inheritance. As to there being no mention of a renewal, this was not upon a fine, so there was no need to raise a fund for that expence. In common understanding, chattels real are real estates. The case of *Addis v. Clement* is very near this case. I admit the words *possessed of and interested in* make that case stronger, but the leading principles are the same. I am very glad to be supported by such a case in the opinion I shall give. I am of opinion that the leasehold tithes did pass, and that the bill must be dismissed, but, as it was matter of doubt, without costs (*m*).

(*m*) *Lewther v. Cavendish*, Amb. 356. and *Lane v. Earl Stanhope*, 6 T. R. 315 (*a*).

[(*a*) The case of *Lewther v. Cavendish*, has been fully reported, 1 Eden, 99, in addition to the cases above cited in the text and notes, vide *Davis v. Gibbs*, 3 P. W. 26. Fitzg. 116. *Knotford v. Gardner*, 2 Atk. 450. *Whitaker v. Ambler*, 1 Eden, 151. *Pistol v. Richardson*, 2 P. W. 459, n. 1 H. Bl. 26, n. *Thompson v. Lady Lawley*, 2

Boa. & Pul. 303. *Watkins v. Lea*, 6 Ves. 633. and as to Copyholds, *Doct v. Earl of Lucan*, 9 East, 448. *Blunt v. Clitheroe*, 10 Ves. 589. *Church v. Mundy*, 18 Ves. 426. and 15 Ves. 396. *Judd v. Pratt*, 13 Ves. 168. and 15 Ves. 390. *Sampson v. Sampson*, 2 Ves. & Bea. 397.]

TRINITY TERM.

20 GEO. III. 1780.

SONLEY and Others v. The Master, &c. of the Clock-makers Company.

Mr. Baron Eyre,
for Lord Chancellor.

CONYERS DUNLOP devised freehold estates to his wife for life, remainder to his brother *Charles* in tail male, remainder to the Clock-makers Company, in trust, that they should, as soon as conveniently might be, after the decease of his wife and brother *Charles* without issue male, or after the death of such issue under the age of 21 years, sell the premises, and that the money to arise from such sale, and the receipts and profits from the decease, &c. till the sale, should be divided among all and every the testator's nephews and nieces already born, or to be born, and their child or children begotten, or to be begotten, to wit, &c. The testator's wife and brother both died in his lifetime. The question therefore was, whether, the devise to the corporation being void, the heir at law took beneficially, or subject to the trust:

Estate devised to a body corporate (which cannot take by the statute of mortmain) in trust, the uses are not defeated by this deficiency of the trustee, but attach upon the estate, the law raises, and the heir at law becomes a trustee to the uses of the will.

Mr. Baron Eyre.—Although the devise to the corporation be void at law, yet the trust is sufficiently *created* to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named (s).

Decreed that the heir at law is a trustee to the uses of the will.

(s) Vide *Maggridge v. Thackwell*, post, vol. iii. 517, and the cases cited in the note to it.

CHAWORTH v. HOOPER.

(o) **A** DEVISE of the residue to an infant, payable at twenty-one, with a remainder over in case of her dying under that age. The question was, whether, as the infant, died under age,

(o) Vide *Studdohn v. Hodgson*, 3 P. W. 300 (a).

[(a) See the cases cited in the note post, 335. *Shaw v. Cunliffe*, post, vol. iv. 144, and the cases cited in the *Pigot*, post, 103. *Huckins v. Combe*, note.]

the infant shall go to her representative, not to the remainder-man.

the

S. C.
13 Serg. Hill's
MSB. 75.
Mr. Baron Eyre,
for Lord Chancellor.

Devise of residue to an infant payable at 21, remainder over; the infant died under age, the interest from the death of the testator to that of

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HOOPER.

the interest, from the death of the testator to that of the infant should go to the representative, or to the remainder-man.

Mr. Baron *Eyre* said he could not distinguish this case from that of *Nicholls v. Osborn*, 2 P. W. 419. The whole residue is here given to the infant, what is to be become of the produce?—Where the use would be, if it was a specific thing, or the rents if it was land. The interest is the natural produce.—It is not a charge upon any body. The produce must go to the person who has the thing liable to be divested: when divested it must from that moment go to the person who comes in.

Decreed accordingly.

Mr. Baron *Eyre*,
for Lord Chan-
cellor.

MOULSON v. MOULSON.

By marriage settlement, part of wife's fortune was advanced to husband for the purposes of his trade, for which he secured her an annuity, the rest being settled upon the children, after the decease of husband and wife, in such proportions as the wife should direct. By will he directed the wife should relinquish her claim [83] under the settlement, and left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children, this is a satisfaction for their portions under the settlement.

BY the marriage settlement £1,100 of the wife's fortune was to be advanced to the husband for the purposes of his trade, for which he secured to her an annuity of £100 after his decease. The remainder of her portion was invested in trustees, to be divided after the decease of husband and wife, among the children according to the wife's appointment, and in default of appointment among them all, with a variety of provisions for events which did not happen. 4th July, 1778, the husband, having very much increased his fortune, made his will, taking notice of the settlement as to the annuity only, and directs that the wife should relinquish her right under the settlement.—He then gives £10,000 to the executors, which he directs to be laid out and the interest paid to the wife whilst sole, and gives her a power to dispose of the £10,000 among the children, and in case of no disposal the children to take the whole. The wife relinquished her right under the settlement. The question was, whether the children took such an interest as should be a satisfaction for what they would have taken under the settlement.

Mr. Baron *Eyre*.—If there be a provision on failure of the wife's appointment, they take a larger interest than under the settlement, and, if more beneficial, it must be a satisfaction. The intent was, that the wife should relinquish for the children, as well as for herself; and although she could not do so, it shews he intended it to be done, and then the Court must do it. Therefore it must operate as a satisfaction (a).

[(a) Vide *Haynes v. Mico*, post, 129, and the cases cited in the notes to it.]

MICHAELMAS

MICHAELMAS TERM.

21 GEO. III. 1780.

EDWARD Lord THURLOW, Lord High Chancellor.

Sir THOMAS SEWELL, Knight, Master of the Rolls.

JAMES WALLACE, Esq. Attorney-General.

JAMES MANSFIELD, Esq. Solicitor-General.

 (a)(p) MAYBANK v. BROOKS.

BROOKS the testator, whose father was indebted to *Maybank*, left a legacy of £850 exactly equivalent to the debt, to *Maybank*, his executors, administrators, or assigns. *Maybank*, at the time of the legacy given, was dead, but of this no notice was taken in the will. The personal representative of *Maybank* filed this bill for the legacy, insisting the words of the will, "his executors, administrators, or assigns," made the same transmissible, that it was the same as if he had said, "and if he shall be dead, I give the same to such person or persons, as shall be his executor, administrator, or assign, &c." and that he meant the legacy to go to the family of *Maybank*, in payment of the debt. The original debt was not otherwise proved in the cause than by the recital in the will. But the plaintiff proposed to read parol evidence of the testator's knowledge that *Maybank* was dead, and his intent that it should go to such person as should be his representative. The evidence was that of an attorney (now dead), who did not draw the will, but gave the testator a draft of a will, and swore he believed the testator had copied the same, the will being all of the hand-writing of the testator. The production of this evidence occasioned some altercation: two objections were taken; 1st, the witness had been examined *de bene esse* before appearance. The defendant appeared and answered. The witness survived eighteen months, the depositions had been published in pursuance of an order, defendants consenting; a motion had been made before the Master of the Rolls, to suppress the deposition, but refused on account of the defendant's consent, upon which the plaintiff now insisted it should be read. *Lord Chancellor* seemed of opinion it ought not.

Legacy to a person dead in the life-time of the testator, lapsed, although the words are to *Maybank*, his executors, administrators, and assigns.

Parol evidence that the testator knew, at the time of making the will, that the legatee was dead, inadmissible.

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(p) Vide *Sibley v. Cook*, 3 Atk. 572. *Sibthorpe v. Moron*, *ibid.* 580, and 1 Ves. 49. *Evans v. Charles*, 1 Anstr. 128. *Long v. Blackall*, 3 Ves. 486. *Hutcheson v. Hammond*, *post*, vol. iii. 128.

[(a) See particularly the case of *Bridge v. Abbot*, *post*, vol. iii. 221. and the cases there cited.]

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 MAYBANK  
 v.  
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The defendants took a second objection, that it was to contradict the words of the will, and they cited *Brown v. Selwyn*, For. 240.

*Lord Chancellor.*—The only fact to which evidence is afforded, is, that the death of *Maybank*, was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible, that could not be from a legatee who had been dead several years. But it is argued at the bar, that the legacy will amount to this; I give to *Maybank* whom I know to be dead, if he shall be alive, but if he shall be dead, to his executors and administrators, or (still more absurdly) to his assigns. It is argued at the bar that evidence may be read to raise as well as to dissolve an ambiguity in a will: this is good law, for it must be raised by evidence. It has gone so far as to give the legacy to a certain person, where there was no such person in existence, as was described in the will; as to *John a Style*, where there was no such person, but testator used to call a certain person *John a Style*. All the cases of the admission of parol evidence are short of this. I must accordingly decree the legacy to *Maybank* to be lapsed (a).

*Bill dismissed.*

[(a) As to the admission of parol evidence, vide *Franquet v. Reynet*, post, 472, and the cases cited in the note to it.]

1780.

Between SELLWOOD HEWITT, Esq. and ANN his Wife, WILLIAM HEWITT (the only younger Child of the said Plaintiffs HEWITT and Wife) THOMAS HEWITT (the eldest Son of the said HEWITT and Wife) both Infants, by the said SELLWOOD HEWITT their Father and next Friend—JOSEPH FRANE, Esq. and CATHERINE his Wife, and SUSANNA WRIGHT GILBERT COOPER, Spinster; which ANN HEWITT, CATHERINE FRANE, and SUSANNA COOPER, deceased, the Mother of the Plaintiffs SUSANNA WRIGHT GILBERT COOPER, were three of the four Daughters of WILLIAM WRIGHT, Esq. and SUSANNA his Wife both deceased.

Plaintiffs :

NATHAN WRIGHT surviving Trustee and Executor of said WILLIAM WRIGHT deceased, the Right Honourable GEORGE HARRY, Earl of *Stamford*, and the Honourable BOOTH GREY, Executors of DOROTHY WRIGHT deceased, (the other Daughter of the said WILLIAM WRIGHT and SUSANNA his Wife) and JOHN GILBERT COOPER the eldest Son and Heir of JOHN GILBERT COOPER and SUSANNA his Wife, and also one of the Co-heirs both of the said WILLIAM WRIGHT and SUSANNA his Wife, and also of said DOROTHY WRIGHT deceased.

Defendants.

**WILLIAM WRIGHT**, Esq. being seised in tail of lands in *Great Sheepy*, in the county of *Leicester* and having by his wife *Susanna*, three surviving daughters, and also a grand-son, and grand-daughter, the children of *Susanna Cooper* the eldest, and now deceased, daughter of *William* and *Susanna*, and having given to the said *Susanna*, upon her marriage with *John Gilbert Cooper*, the sum of £2,100, and a like sum to his daughter *Ann*, upon her marriage with *Hewitt* the plaintiff, and meaning to bar the estate tail, and make provision for his family, he and his wife *Susanna*, by deed 2d *March*, 1752, covenanted with *George Wright*, and *Thomas Wright*, to levy a fine to the following trusts : To *William Wright* for life, remainder to *Susanna* for life (in bar of dower), remainder to the trustees to sell, and to apply the money arising from the sale to pay debts—and then to pay to *Catherine Fraine* (then *Wright*, one of the plaintiffs), and *Dorothy*, now deceased, (the then two unmarried daughters) the sum of £2,100 each; and, after making such payments, to pay and apply the residue as follows: one-fourth to *Susanna Wright Gilbert Cooper*, the grand-daughter, at twenty-one, with interest in the mean while, with remainders over; one-fourth to *Ann Hewitt*, with remainders over; one-fourth to *Catherine Fraine*, then *Wright*,

*William Wright* conveyed estates in fee to trustees to sell, and pay debts, &c. and afterwards to apply the residue as follows :—To raise a sum, and pay interest to *Dorothy* till marriage, and pay the principal to *Dorothy* within twelve months after marriage, then to divide the residue in shares among the plaintiffs. By will he gave, out of other lands, a charge for another daughter, the residue to plaintiffs. *Dorothy* died unmarried, the £1,500 resulted to the settlor, as the residue.

resulting trust, but in his hands was personal estate, and passed as part of

at

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at twenty-one, or marriage, and in case she died before, her share to be paid among the other children of *William* and *Susanna*, or the children of such of them as should be dead; one-fourth to *Dorothy*, at twenty-one, or marriage, and in case she died before, her share to be paid among the surviving children of *William* and *Susanna Wright*, and the children of such of them as should be dead: with power of revocation. By indenture 3d August, 1761, *William Wright* and *Susanna* his wife, revoked these uses, and conveyed the same estates to *Thomas* and *Nathan Wright*, to the use of *William* for life, remainder to *Susanna* for life, remainder to the trustees, in trust, to sell, and pay debts, and then to pay to *Catherine Fraine* £2,100, and after payment of their expences, to pay and apply the residue as follows: To raise £1,500, and pay the interest at 5 per cent. to *Dorothy* till she married, and would live in such part of *England* as the trustees should approve, and to pay the principal sum of £1,500 to *Dorothy*, within twelve months after her marriage, with their consent; and to apply one-third of the residue to *Susanna Wright Gilbert Cooper*, at twenty-one, or marriage, and, if she should die before, remainder over; one-third to *Ann Hewitt* for life, remainder to her children; one-third to *Catherine Fraine*, at twenty-one, and, if she died before, among the children of the grantors: with power of revocation. By will of the same date, *William Wright* gave lands in *Newark* and elsewhere, in or near the borough of *Leicester*, together with all his personal estate, to said *Thomas* and *Nathan Wright*, in trust to sell and to pay debts, and out of the produce to pay £2,100 to *Catherine Fraine*, being the same sum directed to be paid her out of the money arising from the sale of the lands in *Great Sheepy*, and then to put out the monies to arise by the sale, and apply the interest to his wife for life, and, after her decease, to pay the principal, one-third to *Susanna Wright Gilbert Cooper*, at twenty-one, with remainder over; one-third to *Ann Hewitt* for life, then to her children; one-third to *Catherine Fraine*. *William* and *Susanna Wright* never revoked the deed of the 3d of August, 1761. *William Wright*, surviving *Susanna*, died before August, 1765, leaving *John Gilbert Cooper* his grandson, *Ann Hewitt*, *Catherine Fraine*, and *Dorothy Wright*, his co-heirs at law, and also the co-heirs of *Susanna* his wife. The £1,500 for *Dorothy* were laid out in the purchase of £1,716. 14s. 9d. *South-sea* stock, and the trustees permitted her to receive the interest during her life. *Dorothy* died unmarried, about 21st March, 1777, leaving defendant *John Gilbert Cooper* (son of *Susanna* the eldest daughter of *William* and *Susanna Wright*), and the plaintiffs *Ann Hewitt* and *Catherine Fraine*, her co-heirs at law, and having made a will, and appointed the Earl of *Stanford* and *Booth Grey* executors. The plaintiffs filed their bill, claiming the said £1,716. 14s. 9d. *South-sea* stock; one-third part to the benefit of *Sellwood* and *Ann Hewitt*, and their children; one-third to *Catherine Fraine*

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*Fraine*, or her husband in her right; and one-third to *Susanna Wright Gilbert Cooper*, for her use and benefit. The defendants, the executors of *Dorothy*, by their answers, claimed under her will, insisting that the money having been raised, was become personal property (as, if not raised, it would have been a resulting trust to *William Wright*), and they entitled, as executors, to one-fourth of the £1,716. 14s. 9d. *South-sea* stock. The defendant *John Gilbert Cooper* (son of *Susanna*, the deceased daughter), by his answer, submitted that the £1,500 was real estate undisposed of; and that he was entitled to one-fourth, as one of the heirs at law of *William Wright*, and to one-third of one-fourth, as one of the co-heirs of *Dorothy*, and, if the same was part of the personal estate of *Dorothy*, then he claims certain benefits under her will.

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Mr. *Solicitor-General*, Mr. *Madocks*, and Mr. *Hargrave*, on the part of the plaintiffs, contended that the £1,500 was disposed of by the deed of 1761, that by the first deed he meant to dispose of the whole, and by the second he meant to give *Dorothy* only the interest of £1,500, the principal to go to the two daughters, and *Susanna Cooper*, as standing in the place of her mother. The deed speaks this intention by the words *after payment of the £2,000, and reimbursement of expences*.—The £1,500 was included in that residue.—Every thing not disposed of by the deed, was by the will.—The estate comprised in the deed, and that in the will, were the whole of his real estates.

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Mr. *Kenyon*, Mr. *Arden*, and Mr. *Hollist*, argued that the fourth part went to *Dorothy*, as real estate. The property was in such a situation as to give *Dorothy* an election. She by her will gives all her personal estate, and this was in fact personal. The £1,500 is not disposed of by the deed, the trustees were to raise the £1,500, and, after such payment, the residue is disposed of. It was ordered to be turned into money; it was so in *Dorothy's* life, so she had in fact one-fourth of £1,500. They cited *Emblyn v. Freeman*, Pre. Ch. 541.—*Cruse v. Barley*, 3 P. W. 20.—and *Stonehouse v. Evelyn*, ib. 252.

Lord Chancellor stated the case, and the claims of the respective parties, as made by the bill and answers, and divided his consideration of them into two points. First, whether the £1,500 provided for *Dorothy*, passed as part of the residue, by the terms of the deed of 1761. And this he thought it did not.—That the grantor had not expressed any intention of what should become of the sum of £1,500 in case *Dorothy* should not marry, and that probably had that event been in his contemplation, he would have made some particular provision for it. He could not be supposed to mean that it should fall into the residue, without determining, that,



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upon all instruments, where sums were disposed of upon contingencies, which failed, they should fall into the residue, whereby testators would be made to dispose of large sums by the word *residue*, when they meant only to give such small sums as might remain after the several events for which they had specifically provided. Secondly, Whether it was personal estate, and passed by the will, which he thought it did; but this question depended upon what was the nature of the property which the testator had in this £1,500.—His Lordship said he found himself little assisted by the cases. There was a great difference of principle between those of more ancient and more modern date, that in the former, the intention of the testator was supposed to govern, and upon this principle, in *North v. Compton*, 1 Ch. Ca. 196, upon the implied intention of the testatrix, and in analogy to the case of an executor who has a legacy, and is barred by it from taking the surplus, the legacy of £200 deprived the heir of the residue of the estate. That by the latter cases it was established, that where a real estate is directed, by a deed or will, to be sold, so much as the deed or will does not dispose of results as land. This is settled by *Emblyn v. Freeman*. So, if the testator gives the estate to a stranger, with a charge upon it, which fails, that part will go to the heir. *Cruse v. Barley*. So in the case of a term of years devised for payment of debts, the residue undisposed of results as a term in gross. *Wych v. Packington*, 2 Eq. Ca. Ab. 507. (1 Bro. P. C. 372.) If it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though, in the case of the will, it cannot go to the executor as money, not having been converted, but must descend to the heir, yet he should think that it was personal estate of the heir, and, if he were dead, would go to his executor; and, if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such; and therefore, although he thought the case of *Emblyn v. Freeman* right, that the conversion into money did not prevent its resulting to the grantor, he could not help thinking, notwithstanding that case, that the trust of the £1,500 resulted here in the same manner that it vested in *Wright*, the grantor, as personal estate, and so was disposed of by the general terms of the devise. He observed a difference between a charge and a residue; that a charge is personal from its first creation, but a residue continues real till converted.—His Lordship therefore decreed for the plaintiff.\* (a)

\* See the case of *Levet v. Needham*, 2 Vern. 138. That the residue of a term raised for a particular purpose, when the purpose is answered, shall vest in the heir, but he must have it as a term, which must go in a course of administration, and not in a course of descent. The decree therefore, in that case, was for the administrator of the heir, and not for his heir.

[(a) See this case particularly referred to in *Ripley v. Waterworth*, 7 Ves. 431. *Wright v. Wright*, 16 Ves. 103. For the general doctrine upon

the subject, vide *Fletcher v. Ashburner*, and *Ackroyd v. Smithson*, post, 497 and 503, and the cases cited in the notes.]

HILARY



## HILARY TERM.

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## HARMAN v. DICKENSON.

**A** BEQUEST to two daughters of the testator, and if one should die without issue, then to the surviving daughter and her issue. One of the daughters married, and died leaving issue, then the unmarried daughter died.

Lord Chancellor held that the money went to the issue of the married daughter, although she did not survive her sister (a).

[ (a) Vide *Bell v. Phyn*, 7 Ves. 453, and the cases there cited.]

to the issue of the married daughter.

Bequest to two daughters; if one should die without issue, to the survivor and her issue; one of the daughters married, and died, leaving issue, then the unmarried daughter died; it shall go to the issue of the married daughter.

## ATKINSON v. PAICE.

S. C.  
15 Serj. Hill's  
MSS. 127.

**T**HE words of the will were "I devise to my executors, &c. £1,000 three per cents to the use of my niece Elizabeth, and her unfortunate daughter Ann Vaughan, and the longer liver of them, to be paid to their order during their lives, and then to the lawful issue of Ann Vaughan, if she shall have such, if not, in trust for R. Little, until he shall come of age." R. Little died in the life-time of Ann Vaughan. And the question now was, whether it should go to the representative of R. Little, or of Ann Vaughan.

Devise to executors of 3 per cents to the use of E. and her daughter A. V., and the longer liver, and then to the issue of A. V. if she shall have such, if not, in trust for R. L. till he shall come of age. R. L. died, leaving A. V., the fund is given to L., the trust is only the mode.

Mr. Bond (for the representative of Little).—The remainder to Little would, if it was land, be a vested remainder. But it is immaterial whether it was vested or not. *Pinbury v. Elkin*, 1 P. W. 568. *Dyer*, 15 b. 2 Vern. 88. 2 Ch. Rep. 200. The testator gave only the use to the niece and Ann Vaughan, but the remainder to Little. 1 P. W. 432—534. *Wild's Case*, 6 Co. 16. *Nichols v. Skinner*, Pre. Ch. 528.

Mr. Price (for the administrator of Ann Vaughan).—This was an estate tail in Ann Vaughan, therefore, being personalty, the whole must pass to her. *Lodington v. Kime*, 3 Lev. 431.—*Seale v. Seale*, 1 P. W. 290.

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Mr. *Wilson* (for the residuary legatee of testator).—If not given to either *Ann Vaughan*, or to *Little*, it must go to the residuary legatee. It is upon a double contingency: if there is issue, that issue is to take, if not, then *Little*. It is clear that *Ann Vaughan* does not take. If *Ann Vaughan* did not die without issue, it could not vest in *Little*. Then the residuary legatee must take.

Lord Chancellor.—By the words “till of age,” he meant to give the fund to the child, and the trust given till then is only to point out the mode (a).

[(a) Vide *Newland v. Shephard*, 2 P. W. 194, and the cases cited in the note; also *Peat v. Powell*, Amb. 396. 1 Eden, 479. *Hale v. Beck*, 2 Eden, 229.]



S. C.

15 Serj. Hill's  
MSS. 129.

Grant of annuity bill, filed to redeem, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed, on the idea that if inserted, the transaction would be usurious; parol evidence offered to this, but not admitted to contradict the deed, not being charged to have been omitted by fraud.

LORD IRNHAM v. CHILD and others (a).

**L**ORD IRNHAM treated for an annuity with *Child*, who (though unknown to Lord *Irnham*) was an agent for *H. Lawes Luttrell*, his lordship's eldest son. Upon settling the terms it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant from Lord *Irnham* to *Child* should not have in it a clause of redemption. It was accordingly drawn and executed without such clause.—The annuity had been assigned by Mr. *Luttrell* to others of the defendants. Lord *Irnham* now filed his bill to redeem, alleging that such was the agreement, although it did not appear, for the reason above stated, upon the deed. At the bar they offered parol evidence of the agreement. In favour of the admissibility of the parol evidence were cited, 1 Eq. Ab. 20. *Maxwell's case*.—*Harvey v. Harvey*, 2 Ch. Ca. 180.—*Walker v. Walker*, 2 Atk. 98.—*Joyne v. Stratham*, 3 Atk. 388.—Fitzg. 213.—*Lock v. Boulton*, before Lord Camden.—*Vane v. Lord Burnard*, Gilb. Rep. 6.—*Merkins v. Northey*, 5th July, 1756.—*Baker v. Paine*, 1 Ves. 457 (q).

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Lord Chancellor.—If this was supposed to be a subsequent contract, the question would be, whether there could be a right of redemption of an annuity out of lands, by parol, where the

(q) Vide also *Legal v. Miller*, 2 Ves. 299, and *Pitcairn v. Ogbourne*, ib. 375. *Filmer v. Gott*, 7 Bro. P. C. 70. *King v. Scammonden*, 3 T. R. 44, and *Rich v. Jackson*, post, vol. iv. 514; and *Pym v. Blackburn*, 3 Ves. 34.

[(a) Vide the discussion of this point, 1 Hen. Bla. 662, et seq. and Lord Loughborough's observations there, which exceed any thing in print on the subject (Serj. Hill). 3 Wils. 395.]

purchase

purchase could not be but by deed. Whether this question arises upon the statute or at common law, I do not see much difficulty. The rule is perfectly clear, that where there is a deed in writing, it will admit of no contract, that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence. It is contended to be the general authority of a court of equity, to relieve in cases of fraud, trust, accident, or mistake, and that this applies to agreements, as well as to other subjects. This must always clash with the argument drawn from the statute. It is admitted that the deed will bind if no fraud is committed, but objected that when a fraud interferes, there the evidence may be introduced. The objection is founded on a great deal of wisdom and good sense. But the question is, if it were always to be admitted, whether it would not be subversive of justice; the Court has held that it would. If the agreement had been varied by fraud, the evidence would be admissible. The argument then must be to impute fraud to the party. The rule of evidence is not subverted, if there is clear proof of fraud. The committing the agreement to writing, is an argument against fraud. Then as to mistake, or accident; suppose it was a very clear thing that one agreement was intended, and that, by accident, it was extended further.—But there is no such case in the books. If admitted to be a mistake, the Court would not overturn the rule of equity by varying the deed; but it would be an equity *dehors* the deed. Then it should be proved as much to the satisfaction of the Court as if it were admitted. The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake. It is said a mistake of the law is equal to a mistake in point of fact. Here there was no intention that the agreement should make any part of the instrument. The thing insisted upon could not hold a moment, except as matter *dehors* the deed, and on a separate head of equity. Here a large annuity is sold for rather a small price,—not for the natural sum,—the agreement they say was that it should be redeemable, but this does not meet my present idea. To sell an annuity, and make it redeemable, is not usury, because it is not a loan. It is a question whether the intent to suppress this, as leading to usury, will admit the party to come into a court of equity. There is no case of a kind of mistake like this, where the doubt was, whether the clause would be evidence of usury. It was agreed by both parties not to introduce the clause, but it was to stand on parol evidence. Then it results as a question, whether I can admit the evidence. I was long inclined to admit the reading of it. It is necessary to see the statement of the bill: if it states that it was agreed that it should not be inserted, they cannot read it; but if it is stated that it was intended to be inserted, but it was suppressed by fraud, I cannot refuse to hear evidence read, to establish the rule of equity. They are at liberty to read evidence to prove such a fraud as will make a ground of equity.

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The evidence being read for this purpose,

*Lord Chancellor.*—I admitted the evidence to be read, because I thought a case might come out which would afford a new head of equity; for if there was a fraud in admitting, or excluding a clause, the Court might reform the deed. As far as the object was to explain the agreement by any other matter, I thought it necessary to look into the bill, to see whether it alleged it to be fraudulent: had the bill been so, I should have thought myself bound to hear the evidence; and then my duty would be to consider whether it afforded a ground of equity. The plaintiff, supposing he had alleged in his bill what he now insists on in argument, should have stated that he agreed to grant an annuity redeemable, and then the fraud, or mistake, by which the grant was extended. Here, he could not have stated more than this, that the transaction was such as was capable of being usury, or that a little more might make it usury. If so, they thought fit that the agreement should not be inserted in the instrument. If the insertion would make it usurious, no plaintiff could come here and state that as the reason of its not being inserted:—but he says it was under the idea that it might be so, and that that idea was the reason of the surprise.—Suppose one to grant for life, for the purpose of making a qualification for parliament, to be redeemable upon payment of a certain sum, but it was thought such a grant would be elusory, and not admitted as a qualification; it would be extraordinary, if a court of equity should be called upon to call that a surprise. The consequence would be, that the allegation must be, that they had avoided inserting a part of the agreement, not that the agreement was intended to be in the deed. If the bill afforded a proper allegation, it would then be time enough to consider the evidence. But another head of fraud is set up, that he did not mean to treat with his son. I should be very sorry to lay it down that a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside. No case has gone so far\*. *Philips v. The Duke of Bucks*, 1 Vern. 227, was upon a difference of price. Certainly here is

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\* Sed vide the case of *Eyre v. Popham* (a), where *Popham* had, from *Eyre*, having been guilty of a breach of a former contract, expressly refused to treat with him, a third person treated with *Popham*, in fact in trust for *Eyre*, and an agreement having been entered into, *Eyre* filed his bill for a specific performance. Bill dismissed by Lord Bathurst. Mich. 14 Geo. 3.

[(a) This cause came on originally before Sir T. Swell, who decreed a specific performance. Lord Bathurst however reversed that decree, declaring that if it had come originally before him, he would have dismissed the bill with costs. It is reported by Mr. *Left*, p. 786, in his usual diffuse and

confused manner. It appears that the above short note is imperfect. There was no sufficient agreement in writing, or proof of part performance; and the plaintiff, besides having been guilty of the fraud above stated, had delayed paying the purchase-money.]

no fraud stated on the face of the bill. The bill does not go to destroy, but to affirm, and reform the contract. I have no idea of this being notice to the assignees of the annuities, that the annuity was to be redeemable. It is argued several ways that they had notice personally of the transaction—that they had notice by their agent—and that it was necessary for them to apply to Lord *Irnham*. This might have place, if the matter remained in *fieri* and they were bringing a bill against Lord *Irnham*, but here it has no place, for the deed was brought to them by which Lord *Irnham* had granted absolutely. I am not able to conceive that they were obliged to recur to Lord *Irnham*, any more than if it had been a dormant equity (a).

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*Bill dismissed\*.*

\* See also the case of *Lord Portmore v. Morris*, post, vol. ii. p. 219. [Vide Comyn on Usury, p. 68. et seq.]

[(a) Vide *Rich v. Jackson*, post, vol. iv. p. 514, as to the admission of parol evidence to vary an agreement.]

## TRINITY TERM.

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21 GEO. III. 1781.

ROBERT Lord Bishop of LONDON v. FYTCH.

**B**ILL filed by the bishop, as ordinary, against the defendant, the patron, and the clerk presented by him, to be instituted to the living of *Woodham Walter*, in *Essex*. The patron, 2d Jan. 1781, presented *John Eyre* to the bishop, who understanding the clerk had given a bond to resign upon demand, refused, on that account, to admit him, conceiving the bond simoniacal. Upon a *quare impedit* being brought, the bishop filed this bill for a discovery, whether such bond, or some, and what other security had been given by the clerk to the patron for resignation, in order to make use of it for his defence at law. To this bill the defendants demurred, on the ground that a discovery might make the defendants liable to penalties.

Upon *quare impedit* brought against the plaintiff, he filed the present bill to discover whether the clerk presented to him by defendant had not given a general bond of resignation, in order to set up that bond as a defence at law, for having refused him institution. To this bill defendant demurred: 1st. on account of the legality of such bond; 2d. that the discovery was immaterial. Demurrer over-ruled.

Mr. Solicitor-General.—The ground of demurrer is, that if the facts stated are true, they do not give the bishop a right to the discovery; or that such bond was no objection against the clerk being admitted. No such question has ever been agitated in a *quare*

discovery was immaterial. Demurrer over-ruled.  
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impedit, although there have been some actions on bonds, *Hesketh v. Gray*, 2 Burn's Eccl. Law, 341, and Amb. 268. The mischiefs arising from these bonds being taken are obvious, *Durston v. Sands*, 1 Vern. 411, and 2 Ch. Ca. 186. The Court will enjoin where they are made an ill use of. If the cases were out of the question, I should think the bonds were illegal. This suit is brought to have that point considered. It is unnecessary to determine more at present than that the question is proper to be considered. The cases are *Hesketh v. Gray*. *Peel v. The Earl of Carlisle*, Str. 227. *Peel v. Capel*, Str. 534.

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Mr. Madocks, same side.—This is a bill of discovery only, not praying any relief. It is contended there is no equity in the bill. *Hesketh v. Gray*, and all the other cases, were between the patron and clerk, this is between the patron and ordinary. It is said *Hesketh v. Gray* came back from the court of law, and that Lord Hardwicke relieved against the bond. The question is perfectly new, whether the giving of such a bond, will justify the ordinary in refusing the clerk. When an action is brought which depends on the title to land, the defendant has a right to come here for a discovery of the plaintiff's right, 1 Ves. 248.—So here the bishop, having a *quare impedit* brought against him, has a right to such discovery as may enable him to make a defence to the action. Though a general bond, as between patron and clerk, has been determined to be legal, it does not follow that it is not a good objection against admitting the clerk.

Mr. Kenyon for the defendants.—In *Peel v. Lord Carlisle*, the Court would not permit the legality of the bonds to be argued, they having been adjudged to be legal. The most recent case on the subject is above thirty years old. The bonds being legal between patron and clerk, must be so between the ordinary and patron. The discovery sought is of facts totally immaterial: if the bonds are legal, it is totally immaterial (r); if not, though the demurrer had not set forth that it will make them liable to penalties, it is sufficient to set that forth *ore tenus*. It will do under the act 31 Eliz. c. 6. s. 6.

Mr. Solicitor-General in reply.—They are not subject to any penalties by the act, *Swain v. Carter*, Comb. 394.

Lord Chancellor.—Two objections are made to the discovery sought. First, That it will subject the defendants to penalties as a simoniacal contract. It is very clear, that if any plaintiff, for

(r) The demurrer did state as a ground that the discovery might make the defendant liable to penalties and forfeiture. Vide Mitford's Pleadings in Chancery, 156. Prec. Can. 214. *Attorney-General v. Sudell*, in which case such a demurrer was allowed.

any

any purpose, demands a discovery which leads to a legal accusation, he is not entitled to it. If the plea can be supported, from the evidence to be discovered, I must not enforce the demurrer. If there were no cases, I should think it clear that a mere bond of resignation could not be criminal—unless it were for profit or benefit to the patron. Many cases have been determined, that the bonds were good.—The effect of the determination is, that they not only are not simoniacal, but that they are not against the policy of justice. The second objection is, that the discovery is immaterial. This is the first instance of a demurrer for immateriality. If a demurrer was to a bill where the matter was obviously frivolous, the Court might interfere. Here one of the cases treats the matter as too well settled to be argued. It was argued and determined the same way. It is said there is a difference between this and when it is between patron and clerk. I cannot bring my mind to this argument. The bishop has never been compelled to accept the resignation. The question, as decided, carries this along with it, that where the bond has been applied to a bad purpose the Court would restrain; but this is a different question, whether a man, who ought to be independant of every control but the court Christian, shall subject himself by contract to any but his ordinary. In specie, it has never been decided that the bishop is compellable to admit the clerk, but it has been decided that the contract is not illegal. This is not stated as the ground of the present opinion. It is not too much to say, that where a man comes for a discovery of evidence material to his defence, the party shall not protect himself against the discovery, unless he can shew himself liable to penalties, which I think he has not sufficiently done here. There is no instance of the Court having refused a discovery because it was inconvenient to the party making it, for the plaintiff pays the costs of the application, and whether it is material or not, is chiefly for him to judge. I am of opinion they ought to make the discovery, and it will remain with another court to determine how far it is material (a).

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Demurrer over-ruled.

The principal question in the cause coming on in the Court of *C. B. Hil.* 1782, it was determined there in favour of the plaintiff (at law) *Fytche*, that *general bonds of resignation are legal, and are not a justification to the bishop in refusing to admit the clerk.* A writ of error was immediately brought in *B. R.* where the judgment of the Court of *C. B.* was affirmed. A writ of error was then brought in parliament, where, after long debate, the judgment was reversed, 30th *May*, 1783.—See a very

[(a) See the whole of Lord *Rede-*
dale's observations upon this case, by
which it appears that the decision was
a contradiction to the principles on

which the Courts have proceeded in se-
veral cases enumerated by his Lord-
ship, 3d ed. p. 157.]

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full report of what passed in the House of Lords, in Mr. *Cunningham's Law of Simony* (a).

[(a) *Bagshaw v. Bosley*, 4 T. R. 78. *Kircudbright v. Lady Kircudbright*, 8 Ves. 61. *Dashwood v. Peyton*, 18 Ves. 36.]
Partridge v. Whiston, ib. 359. *Newman v. Newman*, 4 M. & S. 66. Lord

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CASSON v. DADE, Clerk.

Will attested by the witnesses where the testatrix could see them through the windows of her carriage, and of the attorney's office, well attested.

HONORA Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket.—The *Lord Chancellor* inclined very strongly to think the will well executed, and the case of *Shires v. Glascock*, 2 Salk. 688.—1 Eq. Ab. 403, was relied upon to that purpose. Mr. *Arden* pressed much for an issue; but, finding *Lord Chancellor's* opinion very decisive against him, declined it (a).

[(a): See the case of *Dee, dl Wright, v. Mansfield*, 1 M. & S. 294, in which Lord *Ellenborough* referred to the present case. The attesting witnesses had there retired from the room where the testator had signed and subscribed their names in an adjoining room, and the jury found, that from one part of the testator's room a person, by inclining himself forwards, might have seen the witnesses, but that the testator

was not in a situation that he might by so inclining, have seen them. It was held, that the will was not duly attested. Lord *Ellenborough* observed, that it was not necessary that a devisor should actually see; he must be in such a situation that he might see the witnesses attest. In favor of attestation it is presumed, that if the testator might see, he did see.]

HASSEL and another, Assignees of JACKSON, a Bankrupt,
v. SIMPSON (a).

A conveyance of all a trader's goods, (he being solvent at the time, and continuing so for three years after), held by Lord Chan-

JACKSON, (a trader, afterwards a bankrupt) made a conveyance to *Simpson*, of a copyhold tenement, all his goods, chattels, and personal estate, to indemnify the defendant, as surety

cellor not an act of bankruptcy, and a new trial ordered, the jury on the first having found him a bankrupt: on the new trial, and a case referred and argued in B. R. determined to be an act of bankruptcy.

[(a) The facts of this case are very fully stated in *Douglas*, on the occasion of its coming on upon the special case.]

for.

for him. It had been sent to law, on an issue to try, whether this was an act of bankruptcy. At the trial the judge directed the jury that it was.—It appeared upon the report, that *Jackson* continued in credit three years after the conveyance, and it was not stated that he was indebted to any other creditor at the time. The jury found that it was an act of bankruptcy.

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Upon a petition for a new trial, Mr. *Madocks* cited *Ryall v. Rowles*, 1 Ves. 348. It is not insisted upon, here, on the ground of his continuing in possession, 1 Jac. 1. c. 15.—*Worsley v. Demattos*, 1 Bur. 467.—*Twyne's Case*, 3 Co. 80. There the possession was fraudulent. This act was not upon the eve, or in contemplation of bankruptcy.—It was done as a contract of indemnity, not a security for a former debt; and the person continued in credit three years.

Mr. *Howorth*, on the same side, cited *Wilson v. Day*, 2 Bur. 827. *Linton v. Bartlet*, 3 Wils. 47. *Law v. Skinner*, 2 Bl. Rep. 996. If the conveyance of all is only to secure a small value, it is not an act of bankruptcy. It is not stated here, that he was indebted to others at the time. He was worth more than would pay this and all the other creditors. The distinction is, that the creditor could not retain more than would satisfy his own debt.

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Mr. *Bearcroft* for the assignees.—“A fraudulent grant or conveyance, whereby the creditors are defeated or delayed,” constitutes an act of bankruptcy. Every conveyance which is fraudulent is an act of bankruptcy. This was a fraud upon the bankrupt laws. A conveyance of all the property is *prima facie*, an act of bankruptcy.

Lord Chancellor.—There is not a syllable of any other debt in the report. It must be taken that he was in full credit, and fully solvent.

Mr. *Bearcroft*.—Still creditors would be delayed, as the mortgagee might take possession of the whole personal estate when he would. It must be held fraudulent on account of his right of entry, and was considered so in *Worsley v. Demattos*.—*Law v. Skinner* is a case in point.

Lord Chancellor.—It comes to this, that a person worth six times the sum borrowed, and no creditor having a right attached, mortgages his whole estate. The bankruptcy was on a debt contracted afterwards. It is not an act of bankruptcy, but a fraudulent act, within the description of the statute. To make an act of bankruptcy, the creditor must be defeated or delayed by the act. This deed does not create an incapacity of paying his debts. In order

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order to declare him a bankrupt, I must consider the simple case, without any fact to prove fraud, as in itself sufficient to constitute an act of bankruptcy.

Petition granted, and a new trial ordered;—which came on at the *Lent* Assizes, 1783, where a case was reserved for the opinion of the court of *K. B.* It was argued in *Michaelmas* Term following, and again in *Hilary*, 1784, when the Court held the assignment to be an act of bankruptcy. These arguments, with the judgment of the court of *K. B.* are reported by Mr. *Douglas* in the second edition of his Reports, p. 89*.

* See this case also, 1 Co. B. L. p. 110. (2d edit.) also *ibid.* p. 111, the case of *Kettle* and others, Assignees of *Ewing v. Hamond*, accordingly (a).

[(a) Also *Harman v. Fisher*, Cowp. 117. *Butcher v. Easto*, Dougl. 295. *Newton v. Chantler*, 7 East, 138, and a condition that it shall be void if a commission of bankruptcy be taken

out, or if all the creditors do not sign within a given period, will not make it less an act of bankruptcy. *Dutton v. Morrison*, 17 Ves. 193. 211. 1 Rose, 212.]

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CULLEN v. The Duke of QUEENSBERRY and others (a).

Committee of a voluntary society entering into agreements with tradesmen, for the whole, sufficient to make them parties to a bill, and not necessary to include all the subscribers.

BILL filed by the plaintiff against the Duke of *Queensberry*, Earl of *Egremont*, Lords *Melbourne*, *Macartney* and *Lucan*, being the annual committee (at the time of the transaction) of the ladies club, for money expended in the purchase of an house, furnishing and attending it, and other incidental expences. At a meeting at Lord *Melbourne's*, 24th *March*, 1775, at which about one hundred members were present, they contracted with the plaintiff for the business to be done, which was the subject of this suit. The defendants, except Lord *Macartney*, 29th *April*, 1775, subscribed an agreement with the plaintiff.—Afterwards some part of the plan being varied, Lord *Melbourne*, Lord *Lucan*, and Lord *Macartney*, on behalf of themselves and the other subscribers, gave a letter of attorney to the plaintiff, to act for them, dated 1st *May*, 1775. The defendants now insisted that they were not personally liable to the plaintiff's demand, that

[(a) The facts of this case are stated at very great length, 1 Bro. P. C. ed. Toml. 396.]

[Lord Keeper *Wright* said, he remembered the case of *Nether Wiersdale*, between Lord *Gerrard*, and some few tenants, and Lord *Nottingham's* case, in the Duchy, concerning the

customs of *Daintree* Manor, and in this, and an hundred others, all were bound, though only a few tenants, parties, else no right could be done, if all must be parties, for there would be perpetual abatements. *Brown v. Howard*, 1 Eq. Abr. 163. (B). ca. 4. (Serjt. Hill)].

all

all that was done was on account of the club, and that sixty persons who had subscribed £4,000 to purchase the equity of redemption of the house should all be made parties. For the plaintiff were cited *Quintine v. Yard*, 1 Eq. Ab. 74. * *Horsley v. Bell*, Chan.

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* As this was a case new in specie, and † is not in print, the Reporter has thought the following note of it would be agreeable to the reader.

Bill filed by the plaintiff, the undertaker of a navigation at *Thirsk* in *Yorkshire* against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. Three questions were agitated at the bar: First, Whether the defendants were personally liable, the defendants contending that they were exercising a public trust, and that the credit was given to the undertaking itself, not personally to them, that the remedy was therefore in rem. Secondly, Whether all who had been present at any of the meetings, and had signed some, but not all the orders, were liable as to all the orders, or only as to those which they had respectively signed. Thirdly, Whether the plaintiff was right in filing his bill in this Court, or his remedy was merely at common law.

The Lord Chancellor considering this as a new case, and of considerable importance to gentlemen who act as trustees in navigation, turnpike, and other bills, was assisted by Mr. Justice Gould and Mr. Justice Ashurst. At the end of the argument, Mr. Justice Gould cited the case of *Melchart* and others, v. *Halcy* and others, executors, C. B. 3 Wils. 149.

Ashurst, Justice.—The principal question is, whether the defendants are liable in their private capacities, or the plaintiff has given credit to the fund. I think the defendants are personally liable; it would be hard that the plaintiff, who has done the work at a reasonable price, without any extraordinary profit, should have no remedy. If he has not, the commissioners, by appointing a clerk to act for them, might deprive every particular labourer of any remedy, except against the fund, which would be absurd. As to the commissioners, their situation is very different, they may have an interest of some sort or other in the undertaking.—They have it in their power to borrow money on a mortgage of the tolls, and know the extent of their credit, which the plaintiff cannot. Various arguments have been made use of in favour of the commissioners, from the clauses in the act of parliament, but they do not apply. It is said they have a judicial power with respect to the property of others, but the power in the clause seems more to be ministerial than judicial, as the jury are to assess the value, and the commissioners are merely to give judgment according to that assessment. Another clause has been cited, that where any damage has been done by the default of the commissioners, the jury are to enquire into the damage, and the persons injured, if not paid in a given time, are empowered to appoint receivers to the tolls,—but this clause relates to consequential damage merely, and is an accumulative remedy. Another argument has been drawn from the plaintiff's declaration, given in evidence, that he was so well satisfied of the success of the undertaking, that he only desired money to carry on the work, and a bare subsistence, and would lend the rest on the tolls:—but the contrary inference is to be drawn from him; for if it was to be understood that, in a bad event, he was to have nothing, it would be a strange declaration. As to the hardships of the case, they are nothing like so great on one side as the other. The commissioners have their remedy upon the monies subscribed and not paid in; for, though there is no summary method of enforcing the payment of them, yet they certainly have a remedy, and there has been sufficient subscribed, so that they have only the trouble of collecting it. As to the second question, This is one general work, though there are several contracts with the workmen

† Reported in Amb. 770 (a).

[(a) 11 Serj. Hill's MSS. 459. Et vide *Pochin v. Pawley*, 1 Bl. Rep. 670.]

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Chan. 9th Feb. 1778. For the defendants, *Knight v. Knight*, 3 P. W. 331. (see also the note on that case). It stood over, Lord Chancellor shewing however an opinion against defendants.

workmen for different parts, and by different sets of commissioners. What is done by the several sets of commissioners is a ratification of acts done before, in the prosecution of one general design. Even criminally, persons acting in one general design will be liable, though they are never proved to have been all together, and that as being a criminal, is much a stronger case. Thirdly, As to its being in equity, it may certainly be done with much less difficulty here.

Gould, Justice.—I concur with my brother *Ashhurst* in the opinion he has given. The engineer is to be appointed by the commissioners, who must give effect and essence to every act: they are therefore to employ workmen, and to pay those workmen. They were to take care to have money to pay their workmen; then are the workmen to lose by their inattention? It is the same as if they had advanced money to their treasurer to pay the workmen. The law raises an *assumpsit* to those who have done the meritorious act. 2. Then there is not so much difficulty, as novelty in this case. It is like a partnership, they who at any time have acted have undertaken a partnership. I should have been of opinion, that an action at law would have lain against any one of them, and that he must have sought his remedy against the others (a). Those who come in at any subsequent time affirm the former acts. It is *ratihabitio*, and *omnis ratihabitio retrahitur & mandato sive licentie equiparatur*, (18 Vi. 156. *cod. tit.*) In an action brought by the pavours, for paving *St. George's, Hanover Square*, against the clerk of the commissioners, C. B. gave a rule to inspect the commissioners books, in order to discover their names, that they might be made parties. I am therefore of opinion, that all the commissioners who have acted are liable.

Lord Chancellor.—The first question is, whether the plaintiff's demand is singly in *rem.* or the commissioners have rendered themselves personally liable. An engineer is appointed and authorized to make contracts: On whose behalf? On the behalf of those who appointed him, or the credit of the act of parliament? Who would make a contract on the credit of tolls, which it is in the power of the commissioners to raise or not at pleasure? Then upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault, if they enter into contracts, when they have not money to answer them. They have made themselves liable by their own acts. If the plaintiff's claim be in *rem.* how is he to come in?—Not surely before the subscribers,—and, if after them, he will stand a bad chance, if he is to wait to see whether there is any remainder. As to the declarations they are only that in future he would lend—he is not bound by them. The commissioners are in no danger if they do not employ workman when they have no money. If workmen were to trust for payment to the event, they would demand immense profits. Upon the 2d question, Whether the commissioners are answerable in *toto*, or only for their particular contracts? The judges have given very strong reasons for their all being liable from the *ratihabitio*. Every man who comes in afterwards, approves the former acts, and if any one of the commissioners who had acted before disapproved the subsequent acts, he might have gone to a future meeting and protested against them. Thirdly, a question has been made at the bar, Whether the plaintiff was proper in this Court? The remedy is not so clearly at law, as for the Court to say he shall have none here, and dismiss the bill; and he must come here for the discovery. Decree for the plaintiff.

[(a) *Gould, Justice*, compared it to the case of partners; he considered it as a sort of partnership to carry the act into execution, and if an action at law had been brought against one commissioner only, unless there had been

a plea in abatement, as in a case where one partner only is sued, in his opinion the plaintiff would be entitled to recover. 11 MSS. 462. (Serjt. Hill).]

19th July, 1781. The objection was over-ruled, and a decree for the plaintiff* (a).

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* After a hearing there was a rehearing on the 23d of June, 1784, when the decree was affirmed; the defendants then appealed to the House of Lords, when the decree was again affirmed, March 23d, 1787. For the case in the House of Lords, vide 1 Bro. P. C. 396. edit. Toml.

[(a) See this case alluded to by Lord Eldon, in *Lloyd v. Loaring*, 6 Ves. 777. In that and many other cases, the principle has been acknowledged, that (in other instances than those of creditors and legatees) where there is a joint interest, if inconvenient to justice that all should be parties, some individuals shall be permitted to re-

present the rest. *Chancey v. May*, Finch Prec. Chan. 592. *Adair v. The New River Company*, 11 Ves. 429. *Good v. Blewitt*, 13 Ves. 397. *Brown v. Harris*, ib. 552. *Waters v. Taylor*, 15 Ves. 14. *Cockburn v. Thompson*, 16 Ves. 321, and the cases of *Drury Lane*, and the other Theatres there cited.]

Between MARY GREEN, an Infant, by WILLIAM }
GREEN, her Father and next Friend, - - } Plaintiffs.

Lincoln's Inn
Hall, July 24.

Sir ROBERT PIGOT, Bart. and HUGH PIGOT, Esq. Defendants.

THE right honorable George late Lord Pigot, by his will dated the 16th day of April, 1775, devised to the defendants all his real estates, upon trust, to sell, and to stand possessed of the money to arise by such sale, and of the rents and profits in the mean time, and he also gave to them his personal estate upon trust, to pay his debts and funeral expences, and, subject thereto, to pay legacies, amounting together to £40,000 and among them to the plaintiff, a legacy of £5,000, and directed the said legacies to be paid to the respective persons to whom the same were given, being males, at their age of twenty-one years, and being females at their ages of twenty-one years, or days of marriage, which should first happen, with interest in the mean time not exceeding £4 per cent. per ann. and directed the interest to be paid by half yearly payments, or in such other manner as defendants should think proper. And he further directed, that in case all or any of the persons, to whom the said legacies were therein directed to be paid being females, should die under the age of twenty-one years, not having been married, or being males, should die under the age of twenty-one years, then the legacy to the persons so dying should not be paid, but should be considered as part of the residue of his personal estate, and gave the residue to the defendants, and his sister Margaret Fisher, share and share alike, and appointed the defendants executors. The testator died on the 11th May, 1777, leaving the defendant Sir Robert Pigot, his eldest brother and heir, and the defendants proved the will. On the 11th March, 1780, the plaintiff,

Legacy to a female infant, to be paid at twenty-one or marriage, with interest at 4 per cent. (but if she die before, to sink into the residue) ordered to be paid into the Bank, in order to secure the legacy, and if greater interest made, that it should be for the benefit of the child.

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tiff, by *William Green*, her father and next friend, filed her bill against the defendants, to have the legacy of £5,000, given to her by the said will, paid into the Bank of *England*, in the name of the Accountant-General, with interest at the rate of £4 *per cent. per annum*, from the time of the death of the testator, till such payment should be made, to be placed out in proper funds, or to have the same secured for the benefit of the plaintiff, and that the interest of the legacy (subject to the plaintiff's maintenance and education) might accumulate for her benefit till she should marry or attain her age of twenty-one years, and in the mean time for a proper allowance out of the interest of her legacy for her maintenance and education. The defendants by their answers admitted assets. The cause came on to be heard before the Master of the Rolls on the 31st of *January* last, when his Honor referred it to the Master to compute interest on the legacy of £5,000, at the rate of £4 *per cent. per annum*, from the end of one year after the testator's death, and ordered that the produce should be laid out in the purchase of Bank £3 *per cent. consolidated* annuities, in the name of the Accountant-General, upon the trusts, and subject to the contingencies in the testator's will. From this decree at the Rolls, there was an appeal to the *Lord Chancellor*, who this day gave judgment thereupon.

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Lord Chancellor.—The rule seems to have varied, different opinions having obtained at different times. *Lord Hardwicke* seems sometimes to have thought that money to be raised should not be raised till the time of payment. *Palmer v. Mason*, 1 Atk. 505.—*Heath v. Perry*, 3 Atk. 101, are both strong cases to shew his opinion to be so.—The latter cases have been that the fund should be appropriated.—*Ferrand v. Prentice(a)*, 10th *July*, 1750, before Sir *Thomas Clurk*, *E. Prentice* gave to the plaintiff £200, to be paid ten years after her death. Upon bill filed to admit assets, and give security, or to pay the money into the Bank, it was decreed that the executor should do so, and that he should have the interest in the mean time, and, at the end of the ten years, the principal should be paid to the plaintiff.—*Walker v. Cooke*, 15th *February*, 1781. Legacy left to one, to be paid at twenty-four, the plaintiff being twelve; the father filed a bill, that the legacy might be invested in the funds; and decreed so, though it was declared, that the plaintiff was not entitled to the money till twenty-four.—*Johnson v. De la Creuze*, 17th *July*, 1749.—£2,000 left to the testator's daughter at twenty-one, in default, to her child; if no child, to *Mills*; bill, to secure the fund; the Court said, a party so circumstauced might come here to have part of the personal estate secured for the legacy. In *Pierce v. Taylor*, 22d *May*, 1778, the same was said to be the course of

[(a) Amb. 273.]

the Court. These cases go to prove, that where a legacy is to be so paid, it must be secured. I do not see a distinction as to its being contingent or merely future. If a legacy be payable at twenty-one, and the child dies, his executor cannot claim till the time when the child would have arrived at twenty-one, if the legacy does not bear interest, but, if it be with interest, he may claim immediately. If it bears a less interest than the utmost use, the executor hath a right to the use of the money, paying the modified interest. *Chester v. Painter*, 2 P.W. 335. Here I do not incline to alter the decree at the Rolls. The legacy is to the child, payable at twenty-one, with £4 per cent. interest, which is the ordinary interest given by the Court. If the interest were severed from the principal, I must order that to be secured. Giving interest even at £2 per cent. vests the principal. Whether a legacy be payable at a fixed or a contingent future day, the effect is the same. I must secure the interest of the fund. If the interest was severed as an allowance, I must secure a fund equal to it. The Master of the Rolls has done right in ordering it to be laid out in the funds. But if it should produce more than £4 per cent. who is to have the surplus? I may order it to be paid to the executor.—But should it produce less, can I order the executor to make it up? No.—I think therefore the produce must be to the use of the infant.

Decree affirmed (a).*

* See *Oldfield v. Oldfield*, 1 Vern. 338. and *Phipps v. Annesly*, 2 Atk. 57, 58. (b) *Gawler v. Standerwicke*, Rolls, November 19, 1787. Reg. Lib. A. 1787. 738. *J. Standerwicke*, by his will, dated the 21st August, 1793, devised to trustees all those his lands, tenements, and hereditaments, called *Outshays* and *Westshays*, to hold to them, their heirs and assigns, to the use, intent, and purpose, that an annuity of £20 a year might be secured to his sister *Sarah* (since dead), and subject thereto, to the legacies therein mentioned, which he charged upon the said premises, to the use of the defendant in fee, and after providing for the payment of the said annuity, he devised as follows: "I give £400 to *Henry Gawler*, and £200 to *Sarah* and *Mary Gawler*, son and daughters of my sister, to be paid to them respectively, at their several ages of twenty-one years, out of my said tenements, called *Outshays* and *Westshays*;" and after disposing of certain other lands, and giving sundry legacies, he devised all the residue of his lands, tenements, and hereditaments, and estate and effects, both real and personal, to the defendant, his heirs, executors, &c. for ever, and made him executor. He added a testamentary paper as a codicil, in the following words: "Be it remembered, that on the 30th day of September, 1777, Mr. *J. Standerwicke* made known unto the Rev. Mr. *Lewis*, and Mr. *John Collins*, that he the said *John Standerwicke* had, in and by his last will and testament, given the sum of £400 unto *Henry Gawler*, the son of *G. Gawler*, to be paid to the said *Henry Gawler*, or some friend in trust for him, as expressed in the will; and whereas the said *G. Gawler* has two younger sons, called *Thomas Gawler* and *John Gawler*,

[(a) There have, however, been many cases since, in which it has been held not to be the legitimate effect of appropriation, to give a larger interest than if there was no appropriation. Per Lord Eldon, *Sitwell v. Bernard*, 6 Ves. 543. For the general cases on

this subject, vide *Chaworth v. Hooper*, ante, 82. *Hawkins v. Combe*, post, 335. *Shawe v. Cunliffe*, post, vol. iv. 144, and the cases cited in the note.]

[(b) This case is very fully and accurately reported, 2 Cox, 15.]

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not provided for in the said will, the design of this memorandum is, that the above-named Mr. Lewis and Mr. Collins were, at the request of the said Mr. Standerwicks, called in to hear and learn his will touching the above-named children; and they, understanding that Mr. Standerwicks was willing and desirous that the said Thomas Gawler and John Gawler should receive the said sum of money, each of them, as was given to their elder brother Henry, and the same interest paid, and the same rules observed, in all respects; and John Standerwicks, in the presence of the said Mr. Lewis and Mr. Collins, promised that the same should be observed; and as a confirmation of it, has set his hand hereunto, the day and year above-mentioned, and in the presence of the said witnesses, John Standerwicks, John Lewis, John Collins, and Thomas Slatter, junior.

"His Honour (Sir L. Kenyon) doth order the bill, so far as the same seeks satisfaction for the legacies of £400 each, given by the said codicil to the will of the said John Standerwicks, to the said plaintiffs T. Gawler and John Gawler, to be dismissed without costs. And his Honour declared, that the legacy of £200, given to Mary Gawler, since deceased, became lapsed by her dying under the age of twenty-one years; and that the said legacies of £400, given to the plaintiff Henry Gawler, the infant, and £200 to the plaintiff Sarah Gawler, the infant, are not, according to the testator's will, to be raised till the same shall become payable; and the said plaintiffs, when they shall attain their ages of twenty-one years, are to be at liberty to apply to the Court to have their said legacies raised out of the said estate charged therewith, and directed the usual enquiry as to maintenance."

In Court, Hilary Term, 1780.
Lincoln's-Inn Hall, 23d Feb. 1780, and 1st of Aug. 1781.

Between RICHARD DURNFORD, Esq. and THOMAS LANE, RICHARD LANE, and ANN LANE, Infants, by the said RICHARD DURNFORD, their next Friend, } Plaintiffs.

THOMAS LANE and ANN his Wife, JOSEPH LANE, EDWARD TYSON, and JOHN HOLLIDAY, and JOHN PLAW and WILLIAM ROBINSON, Assignees of the said Defendant THOMAS LANE, a Bankrupt, } Defendants.

The marriage settlement of a female infant is binding upon her, so far that no act done by her and the husband can avoid it; mortgages by them to persons who had notice of the settlement,

ordered to be assigned to the trustee in the settlement, but the interest, during the life of husband and wife, to be applied to the payment of the mortgages, without prejudice to her remedy against the husband. The wife and her heirs would not have been bound by the articles, if she had done no act, when adult, to affect the estate (a).

UPON the marriage of *Thomas Lane* with *Ann Bowyer*, then an infant, articles were entered into for the settlement of her estates, by which it was covenanted that, upon her attaining her age of twenty-one years, the husband and wife, and her mother, should levy fines, and settle the estate in trustees, (of whom the plaintiff *Durnford* was one), to the use of the mother for life, remainder to the trustees, to pay rents, &c. to the wife, for her separate use during her coverture—remainder to the husband for

[(a) The passages printed, in the marginal abstract, in italics, are according to the direction of *Serj. Hill*.]


life, remainder to the children of the marriage, in such proportions as the wife should appoint, and, in default of appointment, share and share alike, in tail general—remainder to such uses as the wife should appoint, and, in failure of appointment, part to her, and part to the mother in fee. The husband covenanted to permit the wife to enjoy the estates to her separate use, and that he would lay out £500 and £1,500 to certain uses declared by the settlement. There were issue three children, who are plaintiffs. After the wife attained the age of twenty-one years, in 1773, the husband borrowed £4,000 of one *Turle*, and secured the same by a term carved out of this estate, and by a fine levied of the same, this money was afterwards paid, and the term assigned to *Ann Langton* (the mother), and *Lane* and his wife, in order to merge it. In 1774, a recovery was suffered, the deed to lead the uses was to the use of *Ann Langton* (the mother) for life—remainder to such uses as *Thomas* and *Ann* should appoint during *Ann's* life—remainder to *Thomas Lane* for life—remainder to such uses as *Ann* should by will appoint—remainder to *Ann* in fee, with a power of revocation. *Lane* and his wife, with the concurrence of *Mrs. Langton*, the mother, mortgaged part of the premises for £3,000 to *Borrel*, and *Thomas* and *William Holman*, for a term; the remaining uses in the deed were the same as those in the deed to lead the uses of the recovery. These securities, by various assignments, came into the hands of the several defendants, *Joseph Lane*, *Tyson*, and *Holliday*, against whom and the husband, his assignees (he having become bankrupt), and the wife, the plaintiff, the acting trustee, filed the present bill (making the other trustee a defendant) on the part of the children, praying that the articles previous to the marriage, might be specifically carried into execution, or if they should not be held binding on the wife, that the husband might be decreed to be bound by the articles, and to make satisfaction, and charging notice of the articles upon the mortgagees.

Mr. Attorney-General (Wedderburne) for the plaintiff (1st of February, 1780).—The defendants insist that *Mrs. Lane* was not bound by the settlement made whilst she was an infant, but that, when she came of age, she might mortgage the estate. I do not know how far the Court will say she was at liberty to retract. The Court has determined that an infant is bound by a jointure, which must be upon the principle that all acts of infants are not void, but if the acts are for their benefit, that they are bound. Though there is no case, in the books, where the settlement has been said to bind against the will of the infant, yet there is none that the husband and wife can bar the settlement. In the case of *Cannell v. Buckle*, 2 P. W. 243, cited by Lord Hardwicke in *Harvey v. Ashley*, 3 Atk. 615, Lord Chancellor Macclesfield said, "That if a feme infant seised in fee, on a marriage, with the consent of her guardians, should mortgage the estate, without the consideration of a settlement,

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“ settlement, to convey her inheritance to her husband; if this were  
 “ done in consideration of a competent settlement, equity would  
 “ execute the agreement, though no action would lie at law to  
 “ recover damages.” Lord *Hardwicke* says of this case, “ This is  
 “ going a great way, as it related to the inheritance of the wife;  
 “ but yet there are cases where the Court will do it; as if the  
 “ lands of the wife were no more than an adequate consideration  
 “ for the settlement that the husband makes, and after the marriage  
 “ the wife should die, and leave issue who would be entitled to  
 “ portions provided for them by the settlement, it would, in that  
 “ case, be very reasonable to affirm that settlement.” There the  
 supposition only is, that the settlement should be a proper one  
 with respect to the husband. If the Court should be of opinion  
 that a settlement, made with great consideration, should bind the  
 infant, what inconvenience can that opinion be of to the infant, as,  
 in order to bind, it must be a proper beneficial settlement? The  
 only case in which the question can arise, is where the wife has  
 been prevailed upon to join in supplying the husband’s extravagance.  
 To deny it, is to say that her affection ought to expose her to ruin.  
 The parties are bound, by their covenants, to prevent the destruc-  
 tion of the settlement? will the Court suffer the husband, against  
 his covenant, to permit the wife to levy a fine or suffer a recovery?  
 The Court certainly will not suffer the husband to defeat the set-  
 tlement. In such a case, the trustees ought to file a bill to restrain  
 the husband. If, in the present case, we fail in the main purpose,  
 what remains of the estate must be settled agreeable to the articles.  
 Where a husband articles for his wife, he must perform the  
 covenant.

Mr. *Kenyon* on the same side.—It is of very little use to the  
 parties to say, that whoever has taken any part of the management  
 in this case has done wrong. The settlement took care enough  
 of the wife. It was to her for life, to the husband for life, to the  
 children as the wife should appoint, remainder to her in fee. The  
 question is, whether this shall be suffered to be destroyed by those  
 who knew of the settlement? The only ground is, that she was  
 not of an age to bind herself. If this rule ought ever to be relaxed,  
 this is the case where it should be so. Dower arises out of the  
 marriage contract, Bracton, 2d Book, 89. If parties under age  
 may contract matrimony, they ought to be permitted to enter into  
 the other parts of the contract. This is the reason of *Drury v.*  
*Drury*, (*Earl of Buckinghamshire v. Drury*, 5 Bro. P. C. 570.(a),)  
 that the incidental part of the contract shall bind her, though an

[ (a) The case of *Drury v. Drury*,  
 with Lord *Northington*’s judgment  
 from his own MSS., and the case of  
*The Earl of Buckinghamshire v. Drury*,

with the arguments of Lord *Hard-  
 wicke* and Lord *Mansfield*, are reported  
 3 Eden, 39, 60.]

infant ;

infant; the opinion of Lord Northington, that she was not bound, was over-ruled in the House of Lords.

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*Lord Chancellor.*—There it was taken up thus, marriage may be between minors,—that dower attaches upon marriage, the act having said nothing as to the majority of the wife, the act spoke of her when she could make the contract.

*Mr. Kenyon.*—It was in argument, that, if she could enter into the principal contract, she might into that which was auxiliary. The act of an infant is not void if under seal. Contracts, such as apprenticeship, which are for the benefit of the infant, are not void, but voidable. In the case of *Zouch v. Parsons*, 3 Bur. 1794, the acts of infants are gone into. If the acts of infants are such as are reasonable for them to do, and, *a fortiori*, if they are part of a contract which the infant may make, it gives room for observation of Lord Macclesfield, in *Cannel v. Buckle*, and Lord Hardwicke's, in his judgment in *Harvey v. Ashley*, which Mr. Yorke, (in *Drury v. Drury*) said was upon great consideration, and from a written argument. If those opinions are supported by the reason of the case, they will have their effect upon this decree. But if the agreement is not to be specifically performed against the wife, yet against the husband, father, and trustee, who were parties, we shall have satisfaction. In *Mansel v. Mansel*, 2 P. W. 678, and *Garth v. Cotton*, 3 Atk. 751, trustees are answerable for breach of trust. In *Townshend v. Lawton*, 2 P. W. 379, though the Court would not compel the trustee to join, is decreed a specific performance of the father's covenant.

*Mr. Lloyd* on the same side.—The fine and recovery of the wife, when of age, will operate to make good the former transaction, therefore will let in the first settlement, and enure to the uses of it. I cannot find a case where the first deed was that of an infant, but this would apply to all the adult parties. Then it is out of the power of the parties to appoint new uses, the children who are materially interested, not being able to join.

*Mr. Kenyon* cited *Stapilton v. Stapilton*, 1 Atk. 2, to prove this was so at law.

*Mr. Lloyd* cited *Pye v. George*, 1 P. W. 128, that trustees are answerable for a breach of their trust, also *Arnott v. Biscoe*, 1 Ves. 95.

*Mr. Kenyon.*—In *Zouch v. Parsons*, Lord Mansfield, concluded what he said upon the acts of infants with these words,  
“ in

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“in one word, the privilege of infants is to be used as a shield, not as a sword; it never is to be the cover of fraud.”

*Lord Chancellor.*—The part cited from *Lord Mansfield* is a display of principles from which to form a rule, but is not itself a rule. The question is, Whether an infant's contract for marriage binds the lands to all intents; would the settlement prevent her from settling on a future marriage, though there should be a child? Whatever would become of it after the death of the husband, could she avoid it during the marriage? Here the husband bound himself to dispose in a particular manner of the estate, which was in him; the question is, Whether it would be possible that the assent of the wife could ever go to moving the estate out of him?

*Mr. Kenyon.*—By the fine, there were vested interests in the children, which could not be conveyed without their consent. The fine will let in the former settlement. That point will be of great importance if it should go to a court of law.

*Mr. Mansfield* for the defendants, (8th February, 1780).—The first great point is to have the articles carried into execution, as binding upon the wife, as well as the husband. The general answer is, that the articles were made when she was an infant, and, therefore, are not binding upon her. This woman, being a party, when she came of age, levied a fine to the mortgagees, with her husband, by which the estates were as effectually conveyed as if she had been sole.—There is no difference between the conveyance of a married woman by fine, and that of a feme sole. The conveyance was her's, and the land passed from her, she being examined. Then it remains to be seen, whether there is any thing at law, or here, by which this conveyance is to be avoided. There is no rule that such a covenant as this shall bind an infant. The distinction of void, or voidable, is immaterial here, as applied to the acts of infants. The distinction is between conveyances effectuated by delivery, and those which are effectual without; the former are voidable, but there must be an act done to avoid. The word voidable is absurdly used, as to those which are to be avoided by plea. The distinction is as between the infant's bond and a lease; the first cannot be confirmed, the latter may. The settlement was not binding, unless there is something in this covenant to make it so in this Court, as it is not so at law. I do not know that the circumstance of marriage, or of consent of parents, will make the engagement binding upon infants. This is broken into in contracts for settlements in certain cases, and none is pretended to be cited as to real estates being bound by such contracts. The *dictum* in *Cannel v. Buckle* is no decision, and had nothing to do with the case then before the Court. There were very great doubts among

among the judges, in the case of *Drury v. Drury*, as to its barring dower (a).

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*Lord Chancellor.*—*Drury v. Drury* was a question at law, which *Cannel v. Buckle* was not. If Lord *Hardwicke's* opinion, in *Harvey v. Ashley*, be right, he has determined the point, in *Cannel v. Buckle*.

*Mr. Mansfield.*—In *Harvey v. Ashley*, Lord *Hardwicke* seems to think, in certain cases, such a covenant might be binding. I suppose he meant, if, after the death of the wife the issue should dispute the settlement made upon the part of the husband, that such issue, taking under the settlement, should be bound by it.

*Lord Chancellor.*—That would be a case of election.

*Mr. Mansfield.*—*Harvey v. Ashley*, draws the distinction between the personal property and the real; and that, in the latter case, an act of parliament is necessary. It is binding as to personal property, because otherwise the whole would be the husband's, and all the wife gets is clear gain, and for her benefit.

*Lord Chancellor.*—In *Harvey v. Ashley*, Lord *Chancellor* laid it down that the children were purchasers both from the father and mother, and that the property should, therefore, be bound.

*Mr. Mansfield.*—That case was of personal property only. It has never been supposed a young man\* would be bound by such a covenant. All the reasons in *Drury v. Drury* will apply equally to a man as a woman. No difference, from the assent of parents and guardians, is taken notice of by the statute of uses.

*Lord Chancellor.*—I find it still a very difficult thing to distinguish between its binding personal property, which never can become that of the husband, and real property. On the other hand I cannot conceive that the parent's or guardian's consent can make an essential difference in the contract.

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*Mr. Mansfield.*—Something has been said about late cases, I shall only mention them to lay them out of the present case. Trustees being bound as to breaches of their trust, and purchasers, with notice of trusts, being bound by them, do not apply to this

\* Sed vide post, *Slocumbe v. Glubb*, vol. ii. p. 545.

[(a) Three of the judges present in the House of Lords delivered their opinions that Lady *Drury* was not barred, and four that she was, among the latter was Lord Chief Justice

(then Mr. Justice) *Wilmot*, whose very able argument has since been published in his *Opinions and Judgments*, p. 177.]



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case, if I am right in the main point. He then cited *Nightingale v. Earl Ferrers*, 3 P. W. 206.

*Lord Chancellor* put the case, that the new declaration of uses had been to the husband in fee, and the issue had brought their bill that he should stand as a trustee to the uses of the settlement; would not the Court have held him bound so to do? Then the other parties, knowing the interests they have taken, call upon him to misapply those uses.

*Mr. Mansfield*.—In the fine, though the husband must join, the estate passes only from her.

*Lord Chancellor*.—They take the husband's estate as well as hers, the husband is an active party in making the conveyance. Where the wife levies the fine, without the husband, it operates as a conveyance, but not as an estoppel to the husband.

*Mr. Mansfield*.—It was argued that your Lordship would decree the husband to do what was impossible, and *Townshend v. Lawton* was cited: in this case it is absolutely impossible for *Lane* to procure his wife to undo her fine and take back the estate. In *Hall v. Hardy*, 3 P. W. 187, and several other cases, the husband has been decreed to procure his wife to levy a fine, because it is presumed he had her consent before he entered into the covenant; but if she refused, he must be excused.

*Mr. Brown* (on the same side) cited *Lucy v. Moor*, 1740, 3 Bro. P. C. 514.

Upon this case coming on again, before the reply, *Mr. Madocks* cited *Pearson v. Pearson* in this court, in 1770, before the Lords Commissioners, and *May v. Hook*,\* 1773, before Lord Bathurst.  
Mr.

\* *May v. Hook* (a).—Three infant sisters being joint-tenants of the premises in question, and having a leasehold estate vested in them absolutely, by articles previous to the marriage of *Ann*, one of them, with the defendant, dated 20th of October, 1761, it was covenanted that her interest in the leasehold should be assigned absolutely to the husband, and her third part of the freehold should be settled to the use of the husband for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons, &c. and the husband covenanted, if *Ann* should survive him, or have children who should survive him, to pay the trustees, £300 (a sum very inadequate to her fortune), to pay the interest to his wife for life, and, after her decease, to divide the principal among the children.—The marriage took place, *Ann* had a son and died an infant. The question was, whether this covenant had served the joint-tenancy, and held by Lord Bathurst, that it had not.—In giving judgment on this case, Lord Bathurst, cited *Pearson v. Pearson*, stating it particularly; there *Mary Elliot* the intended wife, together with her guardians, covenanted, when she should come of age (if the marriage should take effect) to surrender her copyhold

[(a) There is a much better note of this case Harg. & Butl. Co. Lit. 246 a. n. 184.]

Mr. Attorney-General in reply.—*Pearson v. Pearson* was a bill by the father against the son as heir at law to his mother, for fulfilment of the marriage contract with his wife, for a surrender of a copyhold estate, the mother dying an infant. The circumstances of the family were such, that it was better the estate should be with the son than the father, and therefore the case did not go further, though there was a strong intimation that it would, and the bill was filed upon a very direct opinion of Mr. Yorke's. The case of *Lucy v. Moor* does not go on the ground of the infant not being bound, but on the other circumstances of the case, as a case of election. In *Drury v. Drury* there were no authorities to be found, and so the argument went upon the cases of obligations of infants. The acts of infants are not void, but voidable: this is a clear proposition. Therefore the question is, whether the Court will not restrain the infant, in certain circumstances, from avoiding the act done during infancy. I am not sure an infant might not make a feoffment with livery. The estate would then be vested in the feoffee; the question is, whether the Court would not on circumstances restrain her. There are circumstances, in which persons shall be restrained from avoiding acts done in their infancy, as by acceptance, when adult, of rent under a lease granted during infancy. The general proposition is, that the acts are voidable, and then, in certain cases, the infant may be restrained from avoiding them. An infant may contract for necessities—so for tuition—though this is not decided, yet there are very considerable opinions upon the subject. It is clear from *Drury v. Drury*, that an infant may release a right of dower.—Dower is as much a right, upon marriage, as any she is born to. The case of a jointure here stands upon the contract, not upon the statute; in copyhold estates, which are not within the statute, an infant is bound as to her free bench. *Walker v. Watter*, 1 Ves. 54. If an infant heiress contracts to settle a fortune upon marriage, the Court will carry that contract into execution, if the settlement be for the infant's advantage; the Court therefore thinks it open to it to decide upon the property: and, if the contract is made without the intervention of the Court, the Court will interfere and prevent it from being re-

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copyhold estates, for the purpose of raising younger children's portions, but if there should be no younger children, the whole to remain for the sole use and benefit of the plaintiff, the intended husband *Bradshaw Pearson*; the plaintiff, who was tenant for life of his own family estate, with a power of jointuring, agreed to settle an annuity of £500 a year upon the wife as a jointure, and £150 per annum more if there should be no children, with a power in that case to dispose of £1,500.—The marriage took effect, and the wife died at the age of twenty, leaving issue only one son, the defendant, against whom the plaintiff filed the bill, to carry these articles into execution. The bill was dismissed, but there should seem to be some ground for the Attorney-General's observation upon this case, for a very accurate note of Lord Bathurst's judgment in *Mey v. Hook*, with which the reporter has been favoured, states his Lordship, after having cited the case, and seemed to rely upon it, as saying (from the recollection of some circumstances) that authority was of little weight in the case before him.

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rescinded, by the parties when of age. It is not therefore restrictive upon the man only, and in respect that the woman's fortune would become the husband's. In that view it could not affect a possibility. In *Harvey v. Ashley*, part of Mrs. *Harvey's* fortune was £5,000, in case she survived her father and mother, and that there was no other child. The parents survived Mr. *Pitfield* (her first husband), and no act of his could have affected that sum, yet the Court held that as much bound, by the contract, as her money-fortune. It is there decided, that, in the case of personal property to any amount, there are circumstances in which an infant, contracting on account of marriage, will be barred from rescinding the act. Then the question is, whether it is so as to real estate.—Why should not the Court act in the same manner as to real estate, unless where it wants jurisdiction, as in cases where the ecclesiastical court has it? Here if it fails as to lands, it is because the Court has not jurisdiction over the subject-matter. Therefore if the estate be in trustees, who can convey, and, by their acts, bind all the world except the infant, this Court would say the infant should be restrained from avoiding the estate at law.

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*Lord Chancellor.*—A great deal of the argument has gone to prove, that, at law, the estate passed:—Unless there be a difference of authority under which two deeds to lead the uses are executed, the first deed must bind the estate. To come here you must shew that the first deed was not intended to pass the estate, but that the second was. The difference between real and personal estate goes further than Mr. *Attorney* will allow. The power is *in personam* equally as to both; there is no actual jurisdiction as to personal estate, as to that, the Court can only bind the person. The difference the Court went upon in *Harvey v. Ashley* was, that the settlement may bind not only the property in possession, but that in contingency also. The authorities are, that in *Cannel v. Buckle*, and that of Lord *Hardwicke*. The difficulty with me is, that the husband contracted, on the marriage, that the wife should levy a fine to given uses. It is a proposition not to be controverted, that, if the estate had been afterwards conveyed to the husband under the fine, he would be a trustee to those uses, and that it would not have been competent to any to treat with him, but they would become trustees. Therefore the argument is, that although the wife could not give it to him, yet that she could sell it for his benefit, and that purchasers might buy it of him, because, though she could not give it to him, she could give it to the vendee. This brings it to a very short point indeed—it seems a very subtle line. The husband, in direct contradiction to all which bound him, sells the estate. I confess I have doubts upon this doctrine, in a case never decided. If the contracts are fair ones, I wonder at the party's rashness. I should be sorry to find myself unable to set right what is clearly wrong, though I should be sorry to lay down

down a principle, the effect of which I could not foresee, and which might draw on inconveniencies in future. If I can set it aside, it must be upon some general principle, which will support itself, and will apply to the case.

It stood over.

On the 23d of *February* it stood in the paper, at *Lincoln's-Inn-Hall*, for judgment.

*Lord Chancellor.*—To decree a specific performance of the articles, the Court must carry the principle to this length, that a wife making a wise settlement in her infancy, on the marriage, without any estate settled on the other side, is bound by the agreement, and that, even if the husband had died, she must have continued to be bound. I cannot think an infant, only covenanting as to her estate, can be bound. If she is so at all, it must be in reference to her marriage. No body has yet said that, merely by its being upon marriage, she is bound, but it is said, that upon a competent settlement she would be bound. I think the Court should not go into the competence of the settlement. I must lay down that every settlement shall be considered as good, till shewn to be fraudulent. The cases have not gone so far, nor does my opinion. If she had a settlement from her husband, and, after his death, she had taken possession of it, I think she would be bound, by the equity arising from her own act. I say this in deference to *Cannel v. Buckle*, and *Harvey v. Ashley*. I think she is not bound, unless she has availed herself of the settlement of the husband. In this opinion, I cannot say the whole property is bound, or decree the articles to be specifically performed. Then as to the second part of the prayer of the bill, that the husband may be decreed to be bound by the settlement, and to make satisfaction.—It will require some special directions, as to the parts sold by the husband. It was not competent to the husband, he being party to the settlement, to sell and create new uses to the purchasers. The husband and wife have joined in selling the estate, for which the husband has been paid. Suppose an annuity had been granted by them of £100 *per annum* for £2,000, the feoffee would be declared to be a trustee to the uses of the settlement, but to get his money back again from the husband. When the husband takes it (if the wife was to convey it to him) it would be contrary to his conscience to take it otherwise than subject to the uses of the settlement. If the wife was to hold out, and survived the husband, she might dispose of the estate, but the husband and wife, together, could not do any act to dispose of it differently from the first settlement. Whatever the disposition of the cause may be at present, I should be sorry if it did not go further. *Mr. Mansfield* says, that if you disable the disposition in favour of the husband, you oblige her to dispose of the estate against her will. I say the wife has manifested her intention by the fine and recovery,

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to give it to her husband: then, she having exercised her power, he stands in the circumstance of taking an estate for his own benefit, contrary to his covenant to take it for the uses expressed in the settlement, and therefore he shall be a trustee to those uses. The question is, whether he could in conscience, take it to other uses. It is extremely difficult to say, that, although he could not take it to his own use, that he could do it by selling it, and putting the money into his own pocket. If the estate was sold for a valuable consideration, he would be bound to apply the money to the uses in the settlement. The mortgagees say they purchased of the wife as well as the husband, and therefore, though they knew of the settlement, they have dealt fairly. The answer is, the money coming to him is bound by the uses, he not being able, in conscience, to take it otherwise. Those who claim under the husband must take the estate subject to the same uses, unless the wife's joining makes them not take under the husband. His Lordship pronounced no decree.

*August 1st, 1781.* This cause stood again on the paper for judgment.

*Lord Chancellor.*—The question is, whether the use declared by the infant is a valid use. The mortgagees have got an interest in the estate of the husband, and also of the wife, but no further. The general object of the settlement was the fortune of the wife. The first mortgagees had notice of the original settlement; *Holiday* had no notice, and is the only party in that situation. The question is, what ought to be done under these circumstances,—great doubt has occurred upon it, whether in case of a settlement by an infant, the consideration is, or is not, sufficient to raise an use at law.—The cases are *Cannel v. Buckle*, before Lord *Macclesfield*.—*Harvey v. Ashley*, before Lord *Hardwicke*. It seems by the articles the estate was completely vested, not capable of being divested by any of the subsequent transactions. Those transactions are, *quoad* the husband, contrary to all conscience, and ought not to be suffered.—The sole object was to raise money for him. The mortgagees are so much affected by notice, as to be incapable of deriving any benefit from the estate.

His Lordship decreed that *Holiday* should be paid his costs, which should be added to the plaintiff *Durnford's*, and paid in the same manner with his; that defendants *Tyson* and *Joseph Lane* should assign the several terms to plaintiff *Durnford*, to the uses in the settlement, the Master to tax plaintiff's costs, as between attorney and client, the rents and profits of the estates comprised in the securities to be first employed in payment of those costs, and then during the life of *Thomas* and *Ann Lane*, the rents and profits of the 1000 years term to be applied in the payment

ment of the interest of the £1,000 paid by defendant *Joseph Lane* to *Holliday*, and of the £2,000 to *Tyson*, and then in sinking the principal of those two sums rateably between them, but the payment to *Joseph Lane* to be without prejudice to his remedy against *Thomas Lane*, and to both without prejudice (in case defendant *Ann* should survive her husband) to any claim she might make against the estate, for any loss her estate may suffer by such application, and after the death of *Thomas* and *Ann*, the plaintiff *Durnford* to hold the estate subject to the trusts in the settlement (s).

(s) *Stecomb v. Glubb*, post, vol. ii. 545; and *Caruthers v. Caruthers*, post, vol. iv. 449. (a).

[(a) See the whole doctrine upon this case of *Caruthers v. Caruthers*.] subject, collected in a note to the

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(t) PERKINS v. BAYNTON.

Lincoln's-Inn-  
Hall, August 13.

IN this case, which stood this day for judgment, several points were made which all turned upon the special circumstances, except the following,—*Frances Nott* gave by her will “to *Stukely Baynton* and *William Baynton* £1,500 jointly and between “them.” *William Baynton* surviving *Stukely*, insisted that this joint legacy survived to him, and that he was entitled to the whole.

A money legacy to two (not executors) jointly and between them, is not a joint-tenancy, but to be divided between them; and one dying, the survivor is not entitled to the whole legacy.

As to this Lord Chancellor said:—*William Baynton*, in the life of *Stukely Baynton*, brought his bill for the moiety of this money.—It is contended, that severed the joint-tenancy. I do not know that a demand will sever a joint-tenancy. There is no case that comes up to this, that where a sum of money is left as a legacy it is a joint-tenancy: *Warner v. Hone*, 1 Eq. Ab. 292, is directly to the contrary.—So is *Saunders v. Ballard*, 3 Ch. Rep. 214, for where money is given to two it should be several to them. There is no case (u) of a residue given to persons, not executors, where they have been considered as joint-tenants, *Cox v. Quaintock*, 1 Ch. Ca. 238. (a) and in the case of executors, 2 Ch.

(t) *Frewin v. Relf*, post, vol. ii. 220. *Jolleffe v. East*, post, 325, and *Campbell v. Campbell*, post, vol. iv. 15. *Morley v. Bird*, 3 Ves. 628.

(u) Sed vide *Webster v. Webster*, 2 P. W. 347.

[(a) See the case of *Campbell v. Campbell*, post, vol. iv. p. 15. *Crooke v. De Vandez*, 9 Ves. 197, and the observations of the Court. See *Stacine v.*

*Burton*, 15 Ves. 371. In *Crooke v. De Vandez*, Lord Eldon remarked upon the present case, that at the time of the determination he looked at some of the



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2 Ch. Ca. 64. (*Draper's case*) Lord Chancellor says, "the survivors must carry all, since the judges will have it so," which Nelson reporter, says was Lord Nottingham's very expression. The word here is "jointly," the other "between them;" they be so put together as to affectuate the intent. In *Haws v. Haws*, 3 Atk. 524, it is laid down, that if words are so inconsistent they cannot stand or be reconciled together, the Court must reject those words which are least consistent with the intention of the testator. The intent here was to give to each an usable interest, as it is a sum of money which resolves between them. *W. Baynton's* petition of re-hearing was therefore, as to this dismissed.

the original wills in *Doctors' Commons*, where a construction had been put upon these words, and had made up his mind upon the point upon which he had never had any doubt since, that a simple bequest of a legacy, or a residue to A. and B. without more is a joint-tenancy, and that it is for the other side to shew from some part of the context, applying to that bequest, that the words are not to have their legal operation; accordingly in *Campbell v. Campbell*, where two-thirds of a residue was given to and amongst the children of A. and B. they took as tenants in common, but the remaining third being given to the children of C. they took as joint-tenants, vide *Barnes v. Allen*, post, 181.]

[Where the joint residuary legatees are also executors, the authorities are in favor of survivorship, 1 Vern. 425. 482. 2 P. W. 529. 3 P. W. 115, and *Cox v. Main*, 21st June, 1781, before Lord King, and though the decree by Lord Nottingham, in 1 Ch. Ca. 238, *Cox v. Quaintock* was to the contrary, yet that decree is there mentioned to have been to the dissatisfaction of the bar, and has been often disapproved, and in fact was afterwards reversed, Finch. Rep. 176.

2 Freem. 140. 3 P. W. 115, 1 Vern. 483, the same case is adjudged in favor of survivorship which can only refer to the reversal, and in 2 Freem. 140, it appears the reversal was on a rehearing with the assistance of Lord C. J. Nor were the other judges, who were of the opinion that the first decree was again reversed, which accounts for the expression of Lord Nottingham, in 2 Ch. Ca. 64, "That if a man devise to his survivors, the survivor must carry all, since the judges will have it so," and the case be submitted to their opinion and decreed accordingly, and the authorities have been followed since Lord Nottingham's time, the devise or bequest is joint, the same persons who are also appointed executors, for in the *Page v. Page*, 2 P. W. 489. Shown that in all the other cases where the residue has been considered as lapsing by the death of one of the survivors, and residuary legatees, during the testator's life, it has been because the words were used in the will, at the testator's intention, that the residuary legatees should not take jointly but severally (*Serj. Hill*).]

MICHAEL



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(x) DAWSON v. KILLET.

**R**ICHARD MITCHELL, M. D. by will of the 18th of January, 1766, gave the premises to his wife for life, and, if there should be no issue between them, then to the defendant, charged with £100 to *William Ranscombe*, and £100 to *Martha Ball*, to be paid in six weeks after the decease of his wife. Afterwards *Martha Ball* being dead, the testator by a codicil, reciting that she was so, gave £50 of that £100, to *William Ranscombe*, and £50 thereof to *Anselm Beaumont*, Esq. to be paid at the time when *Martha Ball* would have been entitled to receive it, if she had lived; *William Ranscombe* survived the testator, but died in the life-time of the wife, making the plaintiffs his executors, who, after the decease of testator's wife, filed this bill for the sums of £100, and £50.

R. M. by will gave an estate to his wife for life, and, if there should be no issue between them, to defendant, charged with two sums, to be paid to M. B. and W. R. afterwards M. B. being dead, by codicil he ordered the legacy to her to be paid to W. R. and A. B. W. R. died, living the wife, the charge was vested and transmissible to his representatives.

Mr. Scott (for the plaintiffs).—The interests were vested at the death of the testator, and the payment postponed, only on account of the circumstances of the estate. The interest in the money was as present an interest as *Killet's* reversionary estate. This does not impeach the rule of *Bond v. Brown*, 2 Ch. Ca. 165, or of *Paulet v. Paulet*, 1 Vern. 204, 321.—In this case, the interest vested, and the payment was postponed, not on account of the person to take, but that the wife might enjoy the whole during her life. As the land is charged, the charge must be paid. The cases where the rule applies as to the money sinking are in respect to portions only.—*Buckley v. Stanley*, cited in *King v. Withers*, For. 119.—*Cooper v. Scott*, 3 P. W. 119.—*Wilson v. Spencer*, ib. 172.—*King v. Withers*, For. 117.—3 P. W. 414.—The case of *Hall v. Terry*, 1 Atk. 502, is much mis-stated.—The distinction is recognized as a good one, *Lowther v. Condon*, 2 Atk. 127. 130.—*Hodgson v. Rawson*, 1 Ves. 44. The circumstance of the express charge upon the land will vary it from *Hall v. Terry*. This legacy would have been payable out of personal estate. The case of *Hutchins v. Foy*, Com. Rep. 716, is in point; there it is said the same will which vests the remainder vests it with the charge—it must be taken *cum onere*—*Foy* might devise it, therefore

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he must have a present interest. In *Hodgson v. Rawson*, speaking of this case, it is said it vested with the remainder. So was the case of *Sherman v. Collins*, 3 Atk. 319.—The cases of \**Jeal v. Tichener*, before Lord Bathurst, 4th of July, 1771. 1771.—† *Clark v. Ross*, 22d November, 1773.—‡ *Kemp v. Davy*, 1774,

\* *Jeal and others v. Tichener*.—Henry Shore, by will 20th of April, 1750, devised two houses to his wife for life, and, immediately after her decease, to the defendant Edward Tichener, in fee, he paying thereout to the testator's cousins H. Thornton and Thomas Thornton, £20 a-piece, within three months after the death of his wife.—The testator died May, 1752, and his wife entered. Thomas Thornton survived the testator, and by will gave the legacy of £20 to the plaintiff Thomas Jeal, but appointed no executor. Thomas Jeal obtained administration. Henry Thornton survived the testator, and died in 1758, intestate; administration was granted to the plaintiff, Elizabeth Bequont. The testator's widow died in October, 1767, Edward Tichener entered. Insisted by defendant, that as the Thorntons died in the life of the wife, the legacies were not payable. Lord Chancellor declared the legacies of £20 a-piece to Henry Thornton and Thomas Thornton, vested and transmissible to their representatives, and a charge on the premises devised to Tichener.

† *Clarke v. Ross*.—J. D. Mason devised real estate to trustees, to the use of T. S. Mason for life, remainder to trustees, &c. remainder to his first and other sons, in tail general, remainder to daughters in tail general, remainder to his wife for life, remainder to captain Alexander Wilson, his heirs and assigns for ever, with proviso that Alexander Wilson, or his heirs, if he or they should actually come into possession by virtue of the limitation in the will, should pay to his daughter Elizabeth Wilson, £2,000, and the testator did thereby charge all the premises with the payment of the said sum of £2,000 to the said Elizabeth Wilson, at the end of two years next after the said Alexander Wilson, or his heirs, should come into possession as aforesaid. Testator died, T. S. Mason surviving, who entered, and died 27th March, 1760, without issue, but, by virtue of a power in the will, appointed the whole estate to his wife for her jointure.—She on his death, entered, and enjoyed till 1769, when she died. In 1750 a commission of bankruptcy issued against Alexander Wilson; Ross was chosen assignee. On the death of Elizabeth Mason, the reversion in fee-simple vested in Ross, and he entered and enjoyed two years. Elizabeth Wilson, in 1737, married William Draper, and died in 1743; William Draper died in 1759, and made a will, and appointed the plaintiff executor, who was also administrator of Elizabeth Draper. Lord Chancellor decreed the legacy to be raised with interest, from the end of two years after Ross came into possession.

‡ *Kemp v. Davy*.—Sir John Kemp, baronet, by his will dated 26th of March, 1751, after directing that all his funeral expences and debts should be paid, charged the same upon all his real and personal estate, and, subject to such payments, and to such legacies, annuities, and other out-goings, as should by his will, or by any other means, be created or made by him, or to which the same then were, or should at his death be any otherwise liable; he gave all his real and personal estates unto his wife Elizabeth, since deceased, and the defendant Eleazer Davy, their heirs, executors, and administrators, upon the trusts, and for the purposes after-mentioned. And reciting that his brother, the defendant Benjamin Kemp, was entitled to two annuities of £60 and £27, payable during his life, out of his estates, he directed his trustees to pay them, and then gave to his wife an annuity, or clear yearly rent-charge of £350 for life, to be paid out of the rents, issues, and profits, of his said estates; and bequeathed to her the sum of £500, which he directed should be raised, and paid to her within three months after his death; but in case she refused to accept these in full satisfaction of all her claims out of his real and personal estates, they were to sink into his estate: and after giving her some specific legacies, he gave unto Priscilla Merry, one of the plaintiffs, an annuity, or clear yearly rent-charge of £50 for her life, payable to her, or her assigns, out of the rents and profits

1774, are to the same purpose.—As to the codicil—If the will shows the testator's intent, it will be difficult to find evidence of the

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profits of his said estates; and to the defendant *Martins Short*, a like annuity or yearly rent-charge of £50.—He then also directed that his said trustees should, out of the rents and profits of his said estate, pay or allow to such person as should maintain his nephew *John Kemp*, such sums of money as they should think fit, not exceeding the yearly sum of £60 until the age of 17, and from that time until he should attain the age of 21, not exceeding £300 a year. And he also directed that his trustees should pay, or allow to such person as should maintain the plaintiff *Mary Kemp*, such sum or sums of money as they should think fit, not exceeding the yearly sum of £60 until the age of 12. And gave her £1,500 to be paid to her on her attaining her said age of 18 years; and, in case she should happen to die before attaining that age, he directed that the said legacy should sink into his estate, and should not be transmissible to the personal representative. And he directed that his trustees should, out of the said rents and profits, pay, or allow to such person as should maintain the defendant *Simon Adams*, such sum or sums as his trustees should think fit, not exceeding the yearly sum of £40, until the age of 20. And after he should attain the age of 20, and between that time and his attaining the age of 24, the testator directed his trustees to pay him such further sums as they should think fit, not exceeding £200, and the testator gave to the said *Simon Adams*, £1,000 to be paid to him at his said age of 24; but in case he should die before attaining that age, the testator directed that the said legacy should sink into his estate, and not become payable. He also gave *Adams* a choice of one of his livings, in case he should become a clergyman. The testator then gave to the several persons therein after-mentioned, the several sums of money therein after-mentioned, to be paid as soon as might be after his decease, for mourning: amongst these persons were his sister *Elizabeth Kemp*, *Jane Blois*, the defendant *Martins Short*, and his brother the defendant *Sir Benjamin Kemp*.—And he gave a legacy to the defendant *Kemp* for his trouble. The testator appointed his said wife and him trustees; and in case his nephew *John Kemp* should attain his age of 21, he directed that his said wife and the defendant *Dery*, or the survivor of them, should convey all his real and personal estates, to hold unto his said nephew, his heirs and assigns, subject to such of the said annuities as might be then subsisting, and such debts, legacies, and charges, as might then affect his estate. And in case his said nephew should depart this life before he should attain the said age of 21, he gave the several further additional legacies after-mentioned, (viz.) to his wife £2,000, to his sister *Jane Blois*, £1,000 to his sister *Martins Short*, £1,000 to his sister *Elizabeth Kemp*, £1,000 to the defendant *Sir Benjamin Kemp*, £500 and to defendant *Dery*, £300, and he directed those several legacies should be paid and payable within six months next after such the death of his said nephew under the age of 21 years, and directed and empowered his trustees, their heirs and assigns, to raise those additional legacies, by any mortgage or mortgages of the whole or a competent part of his estates thereby devised to them, and subject and chargeable in manner before-mentioned. And in case of the death of his said nephew under the age of 21, and in case the plaintiff *Mary Kemp* should attain her age of 21, then he gave, devised, and bequeathed all the rest and residue of his real and personal estate, unto and to the use of the said plaintiff, *Mary* his niece, and her heirs, executors, and administrators, for ever, and directed his trustees to convey and assign the same accordingly, and he desired his trustees, when and as often as any savings out of his estate should amount to a competent sum, to apply the same in discharge of such debts, charges, and incumbrances affecting his estates, as they in their discretion should think fit. The testator died 27th of November, 1761. *Elizabeth Kemp* his widow died 27th of February, 1768, having made a will, of which the defendants *Dery* and *William Mann Godeshall* are the executors.—*Elizabeth Kemp*, one of the sisters, died in the beginning of the year 1763, the defendant *Dery* is her personal representative.—*Jane Blois*, another sister, died in April, 1764, and the defendant *Dery* is the executor of her will. *Sir John Kemp*, the nephew, died on the 16th of January, 1771, unmarried, an infant of 16 years, leaving the plaintiff *Mary Kemp* his heir at law. The bill was brought by *Mary Kemp*,

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the contrary in the codicil. *Martha Ball's* legacy lapsed in the time of the testator—his saying, in the codicil, that it should be paid to the persons substituted, at the time it should have been paid to her, is the same as if he had said, to be paid at six months.

Mr. *Mitford* (on the same side) cited *Mason v. Marshall*, 26th February, 1774. *G. T.* gave an estate to one for life, remainder to *Marshall* in fee, and to his niece £500, out of the estate, and went on, "And I charge and make chargeable the estate with the £500." The legatee died in the life-time of the tenant for life, and *Lord Chancellor* decreed the legacy to be raised.

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Mr. *Mudocks* for the defendants.—The first legacy of £100 will stand on the general rule of the Court—The other on a separate ground. This is a general charge of a legacy on a reversion. It is said the legacy will vest with the reversion. *Hall v. Terry* was determined on the ground that the time of the gift and of the payment were the same. *Pawsey v. Edgar*, 1776*, on the principle, that the legacy vested with the reversion. In *May v. Andrews* at the Rolls, *Thomas Gollop* devised real and personal estate to his wife and trustees to sell, in order to pay debts, and to place out the residue at interest, to pay the dividends to the wife for life, remainder over to *Thomas Gollop*, subject to a charge of £50 each, to Mrs. *Strudwicke* and another daughter of the testator. One of the daughters died before the husband, and a bill being filed for her £50, Sir *Thomas Clarke* decreed that the legacy was lost, being out of a mixed fund, which was to be considered as if it was out of land.—*Lord Camden* affirmed the decree in 1768.—This is a legacy to take place six months after the death of the wife. If the legacy vests when the reversion vests, yet if there is any contingency to shew that the legacy is not to take place, it shall not be transmissible. *Proyse v. Abington*, 1 Atk. 482. The legatee cannot transmit the legacy unless he was of the description to take it. The testator meant the legatee should survive the wife in order to take. This argument is not so strong as to the first legacy, as it is to the lapsed legacy.

Mr. *Stainsby* (on the same side).—In *Kemp v. Davy*, the *Lord Chancellor* declared it was an exception to the general rule. The

Kemp, the infant, and her mother, and her second husband, for an account of the personal estate, and to have the incumbrances on the estates discharged by sale of sufficient part of the real estate. Two questions were made in the cause, one quite out of the present case, the other, whether as the testator's widow, his sisters, *Elizabeth Kemp* and *Jane Blois*, though they survived the testator, died in the life-time of Sir *John Kemp* the nephew, their personal representatives were entitled to the additional legacies given them on the contingency of Sir *John Kemp* the nephew, dying under 21.—The Court held that they were vested interests, and transmissible to the representatives.

* See this case stated, post, 191 n. Vide *Attorney-General v. Milner*, 3 Atk. 312.
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general rule is with us, they must bring themselves within the exception. The rule is laid down as to land, in *Bond v. Brown*, just before *Paulet v. Paulet*. So in mixed funds, in *Prowse v. Abington*, the Court would not marshal assets. The reason is, that the civil law Court and this Court might be congruous in their determinations. In *May v. Andrews*, Lord Camden said, though it was a mixed fund, the legacy ought not to be raised. The reference in the codicil to the will is the same as if, in the will itself, the legacy had been given over, and must be if she survived the wife.

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Lord Chancellor.—If the time when the legacy is to be paid is attached to the legacy itself, as for instance to *A. B.* at the age of twenty-one, it makes such a description of the person who is to take, that if the person does not sustain the character at the time, the legacy will fail. But if the legacy be to *A. B.* and that it shall be payable at twenty-one, the description is satisfied, and the rest refers to the payment only. This is the rule as to legacies out of personal estate. In the case of land another rule has taken place, and, at first, universally, and without any distinction,—that being a condition, the money is not payable unless the whole condition is complied with. This rule has long been thought to be too much strained, and therefore not much relied upon in the later cases; but another distinction has been thought of, that the condition referred to the circumstances, either of the person or of the estate. Where it applies to the circumstances of the person to take, as in the case of a portion, the Court has construed a sum so given to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose; so that the purpose failing, the land ought not to be charged. There has been another point also taken into consideration, whether giving the money directly, payable at a certain time, shall make the time so essential as to annihilate the gift, if it does not concur, or it shall be a gift in *presenti*, to be paid at the future time.—There is a long string of cases to this purpose which establish the rule, that where a legacy is given out of a particular fund, with a reference to the time when it shall vest in possession, as for instance to *B.* with a charge to *C.* it is a distribution of the fund between the person to take in present and him who is to take in future, and the gift to *C.* vests immediately. This is a devise after the death of the wife to *Killet* and the testator charges the estate of *Killet* (meaning the interest of *Killet* in the estate) with the sums in question, which distributes the estate between *Killet* and the legatees. Upon the death of the testator the remainder vested in *Killet*, and, the moment it vested in *Killet*, the charges vested in those to whom they were given. It is said the codicil varies the construction; I cannot see how it does. The testator takes notice that the legacy to *Martha Bull* was gone, and gives

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gives it to the others, at the same time that she would have taken it had she been alive. He was taking notice of a legacy which was to vest at his death, but not to be paid till a future time, and only directs that it shall be *in statu quo* it would have been in case of her living. He did not mean to change the form of the legacy, it was purely transferred to other names, to be demanded by them when it might have been by her if it had not lapsed. The legacies of £100 and £50 must therefore be raised for the plaintiffs, with interest from six months after the death of the wife*.

* The case of *Tunstal v. Bracken*, Amb. 167, (in giving judgment upon which, Lord Hardwicke considered the former cases, and the principles upon which they had been decided) being no where in print, the reporter thought a note of it would be acceptable to the profession.

The testator devised an estate of £111 *per ann.* to one of his sisters and co-heiresses, paying £100 *per ann.* clear of all deductions and impositions whatsoever, to his wife during her life; and within twelve months after her decease, to pay several legacies to the value of near £2,000. Legatees to the value of £1,600, survived testator, but died before the wife.

The question was, whether the legacies are lapsed, or transmissible to executors as vested legacies?

Lord Hardwicke, Chancellor. This cause arises upon the head of cases in this Court, that are extremely various, and extensive, and which it may be pretty difficult to reconcile together. I cannot but think, after all, that if the Court should determine this to be sunk into the estate, it would be a very hard case, and contrary to the intention of the testator. It appears manifestly to me, he intended to make provision for a child, in case there should be any, and if no child, then he intended a provision for his sister, who was one of his co-heirs at law, and there is a clause, which has not been taken notice of at the bar, which, though it does not afford a strong argument, yet it is a little material in this case: He says, provided my wife shall be *privement enseint* of one or more child or children, if such child shall attain twenty-one or marriage, then I do hereby revoke the legacies by me given.

It is truly said, at the bar, that it is the general rule of this Court, where legacies are to be raised out of land, and the legatee dies before the time of payment, it is a lapsed legacy upon the foundation of *Pawlet's case*.

But that rule is liable to several exceptions according to the circumstances of many cases cited upon those occasions, which make a distinction between portions given by a parent to children, or where given by a collateral person. The Court will consider the intention of the testator, for, in the case of portions to children, the Court considers the very purpose for which such portion is given, and if the child dies before such portion is wanted, it will sink into the estate for the benefit of the heir, (2 Vern. 439. Pr. Ch. 195).

King v. Withers, (For. 117.) was the case of an additional portion, and it was a strong case to make that payable.

There are other cases where the Court has held hold of particular circumstances in a will, so as to take it out of the general rule, and decree it according to the intention of the testator.

Lowther v. Condon, 2 Atk. 180, has been cited: I do not think it is applicable to either side.

In this case, there are two particularities: It is directed to be paid to the daughter, her executors, administrators, or assigns; another circumstance was, the testator had in one particular event on which the moiety of the portion depended, expressly directed, if that daughter did not attain the age of 21, her portion should go to the sister, and not sink into the estate for the benefit of the heir at law.

Another case was mentioned (*Hodgson v. Rawson*, 1 Ves. 44). it is, in the state of the case, as near to this case as one case can be to another, and held to be transmissible.

The case much relied upon by the defendants, is *Hall v. Terry*, (1 Atk. 502.) I looked into my notes of it last night, and there the whole of the gift depended

pending upon the time of payment. If the gift is only with a direction to pay, the Court will not look upon it as a vested legacy.

The next is *Bradley v. Powell*, by Lord *Talbot*, (For. 193.) I have a great opinion of his judgment, but yet if I had then heard that case, I should not have been of that opinion, for I think it a very hard case.

Consider this upon the plan of this will.—The testator clearly intended, if he left no child, to provide for the other branch of his family. It is impossible to say, here is not sufficient to pay the legacy, for here is an estate of £111 per ann. which would sell for a considerable sum of money, and he certainly intended that for the other branch of this family, the children of his other sister, therefore their representatives are entitled to it.

I think I may go further than 3 Co. *Barston's case*, notwithstanding what has been objected, according to the doctrine laid down in *Willock v. Hammond*, (Cro. Eliz. 204.) Although in the case of a will the word *paying* makes a condition, the law will construe this unapt word to a limitation; for if it should be a condition it would descend to the eldest son, and would be at his pleasure, whether his brothers or sisters should be paid or not; therefore it was adjudged the law would construe it a limitation, and to amount to as much as if he had made a devise to his eldest son till he should make default of payment, of which the younger son might take advantage.

According to the reasoning of these cases, it cannot be considered a condition, but a conditional limitation.

But here the co-heir might bring an ejectment for a moiety of the estate for non-payment, and a moiety of this estate will be sufficient to pay all the legacies; therefore this is distinct from the other cases, as here is a remedy at law (a).

[(a) In all these cases where payment is deferred either on account of some interest in the subject being given to a person on whose death the gift is to take effect, or some difficulty attending the collecting the testator's effects, the bequest is considered as independent of the time mentioned, and the legacy is vested at the death of the testator. *Pinbury v. Elkin*, 1 P. W. 563. *Lope v. L'Estrange*, 5 Bro. P. C. ed. Toml. 59. *Tunstall v. Bracken*, cit. ante. *Medlicot v. Bowes*, 1 Ves. 207. *Hatch v. Mills*, 1 Eden, 342. *Barnes v. Allen*, post, 181. *Monkhouse v. Holmes*, ib. 298. *Attorney-General v. Crippin*, ib. 386. *Benyon v. Maddison*, post, vol. ii. 75. *Scurfield v. Howes*, vol. iii. 90. *May v. Wood*, ib. 471. *Rosbach v. Dean*, vol. iv. 403. S. C. 2 Ves. jun. 264. *Molesworth v. Molesworth*, vol. iv. 408. *Stapleton v. Palmer*, ib. 490. *Hutcheon v. Manning*, ib. 491. S. C. 1 Ves. jun. 366. *Wadley v. North*, 3 Ves. 364. *Perry v. Woods*, ib. 204. *Booth v. Booth*, 4 Ves. 399. *Corbyn v. French*, ib. 419. *Brown v. Bigg*, 7 Ves. 297. *Branstrom v. Wilkinson*, ib. 421. *Wilkes v. Wilmet*, 8 Ves. 10. *Bayley v. Bishop*, 9 Ves. 6. *Lane v. Goudge*, ib. 225. *Smither v. Willock*, ib. 233. *Lady Lincoln v. Pelham*, 10 Ves. 166. *Gas-*

kell v. Harman, 6 Ves. 156, and 11 Ves. 489. *Davidson v. Dallas*, 14 Ves. 576. *Hallifax v. Wilson*, 16 Ves. 168. *Blamire v. Geldart*, ib. 314. *Leake v. Robertson*, 2 Meriv. 363; but where time is annexed to the substance of legacy, it does not vest before the period mentioned. *Spink v. Lewis*, post, vol. iii. 355. *Spencer v. Bullock*, 2 Ves. jun. 687. *Mackell v. Winter*, 3 Ves. 536. reversing the decree of Lord *Alvanley*, ib. 236. *Batsford v. Kebbell*, ib. 393. *Reeves v. Brymer*, 4 Ves. 692. *Hanson v. Graham*, 6 Ves. 239. *Daniell v. Daniell*, ib. 297. *Ehoin v. Ehoin*, 8 Ves. 547. *Faulkner v. Hollingsworth*, cited ib. *Sansbury v. Read*, 12 Ves. 78. *Bernard v. Montague*, 1 Meriv. 422, and the distinction of Lord *Mansfield* in *Goss v. Nelson*, 1 Burr. 226. As to a distinction upon this point, with respect to the bequest of a residue, and of a particular legacy, vide *Monkhouse v. Holmes*, post, 298. As to the effect where interest is given before the time of payment, vide *Walcot v. Hall*, post, vol. iii. 305, when *maintenance*, *Pulsford v. Hunter*, ib. 416. For the consideration of the word "when" and similar expressions, vide *May v. Wood*, post, vol. iii. 471.]

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2 Dick. 581.
18 Serj. Hill's
MSS. 91.

Perpetual injunction granted against a bond for the purchase of an office, upon the public policy of the law, although the office was not within the stat. 5 & 6 Ed. 6.

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(y) HANINGTON Executor v. DU-CHATEL Executor.

THE late Lord Rochford, being groom of the stole to his Majesty, and, in consequence of that office, recommending pages of the presence, &c. treated with the plaintiff's testator to recommend him upon a vacancy, on condition that he should grant two annuities, one of £100 to *St. Ferrol*, the defendant's testator, who had been Lord Rochford's travelling tutor, and was then a bond creditor of his Lordship for £600, and the other of £40 to another person. An action being brought upon the annuity bonds by defendant's testator, for the arrears of the annuity of £100, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled, and upon the motion to continue the injunction upon the merits, the answer being put in, it was argued on the part of the plaintiffs, that this bond was *pro turpi causa*; that Lord Rochford having a confidence placed in him by the king, had abused that confidence, by selling his recommendation; and, upon the public policy of the law, such an agreement ought not to stand. On the other hand it was argued, that it was allowed this was not an office within the stat. of 5 & 6 Ed. 6. that it was merely an office respecting the King's private, not his public, character; and that if it was *turpis contractus* that might have been pleaded at law.

Lord Chancellor expressed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a sufficient reason to prevent his interposition, the court of law never having determined that it could be so brought there as a defence. He then, admitting that it was not within the statute of Ed. 6. but treating it as a matter of public policy of the law, and similar to marriage brokerage bonds, where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing.

Upon the hearing, February 5th, 1783, the injunction was ordered to be perpetual.

(y) *Morris v. M^cCulloch*, Amb. 432. [2 Eden, 190]. and *Whittingham v. Burgoyne*, 3 Anstr. 900. *Law v. Law*, For. 140 (a).

[(a) S. C. 3 P. W. 391, where vide the cases cited by Mr. Cox; also *Hartwell v. Hartwell*, 4 Ves. 811. *Thompson v. Thompson*, 7 Ves. 470. *Osborne v. Williams*, 18 Ves. 379.]

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FALKENER, Executor of CROWDER, v. CASE and others.

ON the 10th of *April*, 1777, *Case* the bankrupt having assigned a vessel (in consideration of a debt then due) together with the policy of insurance upon it, to *Crowder* the plaintiff's testator, covenanted that he would keep up the insurance. The vessel being then at sea, 10th *July*, he made a policy of insurance in pursuance of his covenant, but the broker being a creditor of *Case*, would not part with the policy, and *Case* consented it should remain with him as a pledge for his debt. The assignees having satisfied the broker, insisted that the broker being the agent of *Case*, and having the policy in his custody, it was a leaving by *Crowder* in the possession of the bankrupt within the statute of 21 *Jac.* 1. c. 19, and therefore was liable to the commission, and refused to deliver it to the plaintiff, who thereupon filed this bill.

C. having made an insurance for the benefit of the plaintiff's testator, left the policy in the hands of the broker (he being a creditor of *C.*) *C.* becoming a bankrupt the assignees refuse to deliver up the policy, insisting that this was a leaving the policy in the hands of the bankrupt within the stat. of 21 *Jac.* 1. but determined that it is not.

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Lord Chancellor.—If the question were concerning a bond, or any other *chase in action*, in the possession of the bankrupt, it would be within the statute of 21 *Jac.* from the case of *Ryall v. Rowles*, 1 *Ves.* 348.—There is no difference as to pawns, whether the goods have been in the possession of the pawnor, or come into the possession of the pawnee. So, where there is a lien there is no difference whether the special property be by the act of the pawnor or any other way. Then, suppose there was no such statute. In this case, there is no doubt the plaintiff obtained the property. When *Case* made the assignment, *Crowder* acquired the property, and had a right to come here for the specific performance. Whatever binds the property in the hands of the bankrupt, binds it also in the hands of the assignee. Therefore, if it stands clear of the statute, *Crowder* is in the case of the bankrupt whilst solvent. Then as to the effect of the statute, if any person shall leave property in the hands of the bankrupt, it shall be fraudulent. Then, was the interest of the bankrupt, within the words, “goods and chattels?” I say yes. Were they goods and chattels residing with the bankrupt? What was the bankrupt's interest? An equitable right to redeem *Berkley* the broker. He parted with that right. The bankrupt, whilst solvent, assigned over the whole to *Crowder*. The objection is, that he did not deliver the goods,—but he had no property to deliver, it was only an equitable right. Every shade of interest was vested in *Crowder* before *Case*'s bankruptcy, therefore nothing resided in the bankrupt. The statute ought to be construed a *jus positivum*, and it is in that view that it is impossible to qualify *Crowder* as having left the property in the hands of the bankrupt. The construction has been carried further, as where ships are at sea, and a symbolical possession only can be given, that has been thought sufficient. This is a much stronger case than that. But it is argued that it would have

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have been proper for *Crowder* to have given previous notice; and there might have been cases in which the neglect of so doing would have injured his situation, as if *Berkley* had delivered the policy to *Case*, *Crowder* would have had no remedy. If it be right to strain the statute in any case to effect its intention, this is too slight a one, the notice would have been only between *Crowder* and *Berkley*. Where the person possessing an equity assigns it, there is no property remaining in the assignor (a).

Decree for Plaintiff.

[(a) See this case more fully reported, from a note of Mr. Justice Ashurst, in *Lempere v. Pasley*, 2 T.R. 491. The whole of the doctrine upon

the statute of *James* is collected and very ably arranged by Mr. *Buck*, in a note to *Ex parte Smith*, in the matter of *Bakerell*, vol. i. p. 149.]

B. C.
15 Serj. Hill's
MSS. 264.

A will in these words "I give all in *Suffolk* to *R. M.*" does not pass a bond which happened to be at testator's house in *Suffolk*.

(z) MOORE v. MOORE.

THE testator left a testamentary paper—which was established by the ecclesiastical court—"I give all in *Suffolk*, to *R. Moore*, Esq. (the plaintiff) and heirs—I give to *R. Moore*, Esq. all my goods and chattels in *Suffolk*." The testator had goods and chattels in *Suffolk*, and also in other counties, and, in a drawer at his house in *Suffolk*, was found a bond, which the plaintiff claimed as goods and chattels in *Suffolk*, and, upon the defendant the residuary legatee refusing to deliver it, filed this bill. The question was, whether the bond passed?

Mr. *Kenyon* for the plaintiff.—By a devise of all the testator's goods a bond will pass, 1 P. W. 267. A bond is *bona notabilia* in the diocese where it is, 1 Ro. Ab. 909.

Mr. *Hollist* (on the same side).—Goods by the civil law mean every thing, as chattels do at common law. Here is nothing to restrain the generality of the term. It is admitted the testator had many other goods and chattels in *Suffolk*, but why should the Court restrain the generality of the construction?

Mr. *Scott* (on the same side).—This is unquestionably an argument upon the intention of the testator. The word *goods* will include bonds, leases for years, and all other personal property *ex vi termini*, unless there is something in the will to restrain the construction. It is not said in any one book, that goods do not mean obligations, except in *Calve's* case, 8 Rep. 33, which was an action against an inn-keeper, and *Dyer* 5 b. which grounds that

(z) *Sanders v. Earl*, 2 Ch. Rep. 8vo. 188. Vide *Popham v. Lady Aylesbury*, Amb. 68. *Woolcomb v. Woolcomb*, 3 P. W. 111. Bank notes considered as cash within the annuity act. *Cousins v. Thompson*, 6 T. R. 335.

opinion

opinion in 2 Ro. Ab. 58.—In *Kelsett v. Nicholson*, cited Dy. 5 b. (in the margin) the Court held that by *omnia bona & catalla* obligations passed, against *Fenner*, who insisted the wax and parchment only passed, not the duty. The bond is *bona notabilia* in the diocese where it happens to be—and passed to the wife by the devise of all goods and chattels, in the case in 1 P. W. If bonds will not pass, why should leases for years? 1 Eq. Ab. 199.

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Mr. Solicitor-General for defendant.—By goods and chattels in an house, could any body mean a bond in a bureau? Bills of exchange would not pass*, though they are not *bona notabilia* but merely personal, so of records; judgments, which are *bona notabilia*, would they pass by the words *goods and chattels* in *Middlesex*? 8 Rep. *Calve's* case, Dy. 5 b (a).—*Channel v. Robotham*, Yelv. 68.—By *Chapman v. Hart*, 1 Ves. 271. Bonds or *choses in action* will not pass by the words *goods, &c. in an house*.

Mr. Spranger (on the same side) cited Swinb. 475.

Lord Chancellor.—If this case is to be decided without further enquiry, we must take it for granted the bond was in the house, that the testator had other goods and chattels in the house, and goods and credits elsewhere. Under the instrument, *R. Moore* claims the bond as a specific legacy, and the question is whether, from the context, it can pass. As to the point of construction; the Court construes legacies according to the canon, not the common, law. It is argued that *bona* includes all credits, as well as chattels, at common law, and that the words *all goods and chattels* will pass bonds and all credits. The true point is, whether the context will qualify the meaning of goods and chattels. Whenever words are used in an instrument it is a good rule to say, they shall be construed agreeably to their legal sense. In order to construe them otherwise, there must be something to shew that they are used in a less technical meaning. This is to be shewn by the person who claims under the particular sense. 1st, It has been argued, that the words do not mean credits,—I think they do. 2dly, That the words, when local, do not imply them; and, with respect to specialties, that they have no locality.—The question is, whether this peculiar kind of credits has that sort of locality which was within the idea of the testator. This is not a solemn codicil, but requires therefore a more favourable construction. The sentences are mangled and imperfect. It is contended, that this sort of credit has locality, because the law has made it *bona notabilia*. But it is doubtful whether the court Christian

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* Sed vide 2 Bac. Abr. 401.

[(a) The case in *Dyer* arose on the construction of the 31 Hen. 8. c. 7. which being very penal, is, as all other penal statutes, to be construed strictly,

and therefore that case is not applicable to the construction of the word *bona* in other cases. (Serj. Hill).]

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having thought it sufficiently local for that purpose, is enough to make it local as to this. If the question hung more in doubt than it does, I should be obliged to follow Lord *Hardwicke's* case (*Chapman v. Hart.*) The judgment there goes clearly to this case.—He has compared bank-notes to money(a). *Choses in action* have no locality, bonds have no more locality than other *choses in action*, otherwise than by drawing the jurisdiction of the ecclesiastical court: and the judgment, in that case, must prevail. In this case, also, it has weight, that the house was given to the same person. Removal of goods for a necessary purpose, is not an ademption of a specific legacy.—But would you follow bonds and judgments in the same manner.—It would be too much to argue it in that way. The authority of that case must go so far as to include bonds with other *choses in action* as to their want of locality.

Bill dismissed.*

* In the case of *Green v. Symonds*, 27th of February, 1730, the testator by will gave to *B. int. alia.* all his goods, &c. in his study, except his books and writings: he gave to *C.* all his books, at his chambers in the Temple. At the time of the testator's death, there were, in his study, a considerable sum of ready money, and securities for money, and plate; but he had removed the books into the country. One of the questions agitated in the cause, and which applies to the principal case was, whether *B.* should take the money, securities, &c. which were in the study, or the furniture only. The Lord Chancellor held the money and plate to pass, but not the securities for money, they being *choses in action*. Secondly, that the removal of the books annulled the legacy, because a will of personalty shall only be construed from the death of the testator. With respect to this latter point, Lord *Hardwicke*, in the case of *Chapman v. Hart*, distinguished between the cases of goods in a house, and in a ship; in the latter case, he held, that the removal was no ademption of the legacy; in the former it would, unless it was from necessity, as, removal of goods to save them from fire, which is no ademption, because, in every case of ademption there must be something to shew a change of intent.

[(a) In *Lady Aylesbury's* case, reported Amb. 68. nom. *Popham v. Lady Aylesbury*, which was a bequest of "my house, and all that shall be in it at my death," Lord *Hardwicke* held, that cash passed, and bank notes, but not promissory notes and securities, as they were the evidence of title to things out of the house and not things

in it. Lord *Eldon*, in *Stuart v. The Marquess of Bute*, 11 Ves. 662. has however expressed his disapprobation of the application of this doctrine to bank notes, which his Lordship considered in the same situation as other securities. Vide also *Jones v. Lord Sefton*, 4 Ves. 166.]

HAYNES v. MICO.

Bond upon marriage to secure £300 (the wife's fortune) to the wife within one month after husband's decease. By will the husband gave her £500 payable within six months after his decease, together with other legacies, the bequest of £500 is not a satisfaction for the £300 secured by the bond.

UPON the marriage of *James* and *Susanna Mico*, in 1743, the husband gave a bond to trustees in the sum of £600, conditioned to leave to the wife £300, (being the wife's fortune) payable in a month after his decease, in case she should survive

him.

him. By an indenture, after marriage, the husband settled an house in *Cork Street, Worcester*, to the use of himself for life, remainder to the wife for life, which together with the £300, was to be in bar of dower. By his will, he gave to his wife £500, payable within six months after his decease, he gave her also an house in fee, the house in which they lived for life, and several other specific legacies, and died in 1773. In 1776 *Susanna* died, and her will being litigated in the ecclesiastical court occasioned the delay in bringing this suit, which was brought by the representatives of *Susanna*, against the nephew and residuary legatee of *James*, for the two sums of £500 and £300, the sole question being, whether the legacy of £500 was, or was not, a satisfaction for the £300 secured by the bond.

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Mr. Madocks for the plaintiff.—The legacy and the sum secured seem here to be under different circumstances, and the Court never applies the rule of satisfaction, but where the legacy and the debts are of the same description. This is Lord *Cowper's* rule in *Eq. Ab.* 205.—Here it is not to be presumed that the legacy was intended to be in satisfaction, for, by the bond, the money was to be paid in one month, and the legacy is to be paid in six months.

Mr. Kenyon (on the same side).—It is very difficult to find a reason why a man should not be generous as well as just.—*Lee v. D'Aranda*, 1 Ves. 1. (a) is hardly applicable here, as the subject in that case was what fell by act of law; here it is an intended bounty.

Mr. Solicitor-General for defendant.—The bond recites the marriage, the portion of £300, and that the husband had agreed to leave the wife £300.—After giving her the £500 and the specific legacies, he gives the residue in large words to the nephew, and orders the other legacies to be paid in twelve months.—No case has been cited like this: It is not a legacy to a creditor for a subsisting debt—the provision was to be necessarily £300, this is £300, and £200 more, the £200 is a bounty.—There are two cases where the money was suffered to come by an intestacy, and the distributive share was held to be a satisfaction: I cannot see the difference between that and giving it by will.—Here he does it in the terms of the engagement, for he leaves it her by will, which is stronger, *Blandy v. Widmore*, 1 P. W. 324.—*Lee v. D'Aranda*. *Clark v. Sewell*, 3 Atk. 96.

Lord Chancellor.—This has been argued upon a very different ground from the cases in the books, and in such a manner as to raise a new and more peculiar ground of decision. If this had been the case of a creditor in the life-time of the husband, the circumstances of difference would have been sufficient against it as a

[(a) S. C. 3 Atk. 419. nom. *Lee v. Cox*.]

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satisfaction. The first cases on the subject are those where there were circumstances to shew it to be the intent of the testator that the money should be applied in payment, they did not rest on the mere circumstance of equality. In Equity cases (*Pile v. Pile*, 1 Eq. Ab. 204.) there is a case where evidence was admitted to prove the testator's intent to increase the portion. Afterwards the cases took a different turn, because the declaring it a rule of construction of wills, to presume the intention of testators by conjecture, was held to be an unsound manner of interpreting such instruments. The Court adopted the rule of the common law, and took it for granted, that where the debtor gave the creditor an equal sum, it was intended as a satisfaction.—This was carried to a remarkable length in *Cramer's case*, 2 Salk. 508. where the debt was contracted subsequent to the making of the will, and the legacy was held by the *Master of the Rolls* to discharge it. That case gave the first check to the doctrine. It was reversed upon an appeal on two grounds; first, that there was no implication of law that the legacy was a satisfaction; secondly, that it was impossible to give evidence of an intention to satisfy debts contracted subsequent to the will. From that time the stream turned, and has since gone in restriction of that idea, so much as, even, to overturn the cases which went before. If this had been a debt of such a nature, I should have thought the legacy could not have been a payment of the debt.—I am not so well satisfied with the manner of arguing the other point, many cases have been cited which do not bear upon it. This is not a case where the party was indebted, he was only bound by a covenant to do a thing in future. It is fairly argued from the recital in the bond, that it must be taken as a covenant to leave her a sum of money. The question must therefore turn upon this legacy being, or not being, a performance of that covenant. (a) The cases under the statute of distribution were determined in analogy to the rule of law, as to lands descending in performance of a real covenant. The circumstances of its not being to be distributed in that case in less than a year, and still being held a satisfaction, shews that the Court has little regarded mere formality. Then, where is the difference between that case and one in which the person bound to perform the covenant leaves a legacy by his will? Having contracted to leave her a sum of money, and having actually left it, the question is, whether he has not performed his covenant, although he might possibly mean to do a different thing. There are many cases where the Court has dispensed, in the performance of covenants, with circumstances of this sort. If the sum had been the same, but payable at six months, she would not have been bound to accept it in that form, but could she have insisted that he meant not to perform his covenant, but to do a different thing? I cannot say that by doing a thing so nearly the same, he did not mean it as a per-

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[(a) Vide *Blandy v. Widmore*, 1 P. W. 325.]



formance of the covenant. He has done it, but with a variation, on account of which I am called upon, by the plaintiff, to say he did not mean to perform his covenant. If the defendant had contended that the testator had performed his covenant by giving the specific legacies, though it would rest with the plaintiff to shew he did not by them mean performance, he might sustain it from the great difference between the subjects; but they contend, on the other ground, that being bound by his covenant to leave her £300, and giving her more by his will, he meant it in payment of that, and it lies upon the plaintiff to prove that he did not mean so to do. However, as there seems to be difficulty in the case, let it stand over till the first day of causes after term.

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When the cause came on again in pursuance of the above order, his Lordship expressed a change of opinion, in consequence of which he decreed, finally, in favour of the plaintiff, that this legacy was not a satisfaction of the £300 secured by the bond. The Reporter was absent, but is informed, that he considered the subject first in the light of a debt, and held that, so considered, this legacy could not be deemed a satisfaction. He put the case of its being a bond to a stranger, it could not have been a payment. In the case of *Clark v. Sewell*, 3 Atk. 96, Lord Hardwicke laid down the rule, that where there was a difference, in any circumstance, between a legacy and the debt, the legacy should not be deemed a satisfaction; therefore, in this case, the debt being payable in one month, and the legacy in six months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt: if he did intend so to do, it was extraordinary he did not refer to the obligation. His Lordship distinguished it also from the case of portions, where the father, being bound to make a provision, is considered as having, by the legacy, performed that obligation, and also from *Blandy v. Widmore*, and *Lee v. D'Aranda*, where the wives having administration, the fund was vested in them before the time at which the covenant was to be performed, a circumstance much relied upon by Lord Cowper, in the former case, and concluded with repeating and relying on the circumstance of the different times of payment of the bond and the legacy\*.

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\* A case of *Castle and Others v. Morris and Others* was heard by the Lord Chancellor at a time when the Reporter was absent: as one of the questions comprised in it was in some measure similar to that in the present case, he has stated it here from the cases in the House of Lords (a).

Henry Merryweather and Ann his wife, seised in fee-simple (in the right of Ann) of a moiety of lands in *Hassage* and *Norton St. Philip*, in the county of *Somerset*, by indenture, 4th October, 1740, covenanted with trustees to levy a fine to enture to the use of *Henry Merryweather* for life, remainder to *Ann* for life, remainder to *Rachael Coles* (sister to *Ann*) for life, remainder to trustees for a term of one thousand years, remainder to the right heirs of the survivor of *Henry Merryweather* and *Rachael Coles*. The trusts of the term were to raise £1,000, to be paid to such of the relations, &c. of *Ann*, and at such times, and in such proportions, as the survivor of *Henry Merryweather* and *Rachael Coles* should

[(a) The case is reported 6 Bro. P. C. ed. Toml. 418.]

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should by deed or will appoint, and, in default of appointment, to the next heir or co-heirs of *Rachael Coles*. The fine was levied; *Henry Merryweather* and *Ann* both died in the life-time of *Rachael Coles*, who thereby became entitled to the inheritance of the moiety comprised in the indenture, subject to the term of one thousand years; she was at the same time, and at the time of the execution of the indenture, seised in fee of the other moiety; she died 26th April, 1769, having made her will, bearing date 26th November, 1756, by which she gave annuities to the father of the plaintiff *Mills*, and to the mother of the defendant *Veale*, and, after their decease, sums of £100 each, to be divided among the children of the annuitants, charged on lands not comprised in the settlement, and an annuity to the mother of the plaintiff *Litman*, and, after her decease, a sum of £100 to be divided among the children of the plaintiff *Litman*, charged upon *Hassage* estate (one moiety of which was comprised in the indenture), and, having given other legacies charged on *Hassage*, devised the premises to a trustee for a term of one thousand years to raise the same: and gave all her messuages, &c. whatsoever, in *Hassage* and *Norton St. Philip* (charged with the payment of the annuities and legacies) to defendant *Morris* for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail general, remainder to his daughters in tail general, remainder to defendant *Veale*, sen. with like remainders, remainder to *J. Litman*, son of plaintiff *Litman*, in fee. And, out of her personal estate, gave several legacies, and gave the residue to *John Morris*, sen. *Rachael Coles* made no other appointment of the £1,000. The plaintiffs *Cantle*, *Mills*, and *Elizabeth Litman*, wife of *William Litman*, (father and mother of the plaintiff *Litman*, both since deceased), were her heirs at law, and in 1772, filed their bill, insisting that they were entitled to have the £100 raised. The defendants put in their answers, and after several revivals, upon the decease of parties, the cause came on at *Lincoln's-Inn-Hall*, 12th March, 1781, when the defendants set up their three defences: 1st, That *Rachael Coles*, having become entitled to the inheritance in fee of the moiety comprised in the term, the terms sunk into the inheritance: 2dly, That the will operated as an appointment; and the devisees of the estate, being relations of *Ann*, were capable of taking as appointees: 3dly, That the legacies and other charges were satisfactions *pro tanto*, and therefore (if they were wrong upon the other points) only the residue of the £1,000 should be raised; but *Lord Chancellor* ordered the whole of the £1,000 to be raised for the plaintiffs, from which decree there being an appeal to the House of Lords on the 12th of June, 1782, the same was dismissed, and the original decree affirmed.

In *Devese v. Pontet* (reported by Mr. Finch, in a note upon the case of *Brown v. Dawson*, in his edition of Pre. in Ch. p. 240.) at the Rolls, *Michaelmas*, 1783, his Honor recognised the principles of this case of *Haynes v. Mico*, and determined accordingly. As to a residue, ante, *Richman v. Morgan*, 63 (a).

[(a) The judgment in *Devese v. Pontet* is reported in 1 Cox, 188, at much greater length than in Finch, Pre. Ch. These cases, though they have never been in terms impugned or shaken, appear not to have met with entire approbation. But as no case in which the question of satisfaction of a covenant to provide for a wife has occurred in a case of *testacy*, the question still remains open. In case of *intestacy*, the distributive share received by the widow is considered when her distributive share is equal to a performance of a covenant from the husband, that she should on his death receive a sum of money; when inferior as a part performance. *Blandy v. Widmore*, 2 Vern. 709. 1 P. W. 324. *Lee v. D'Aranda* (should be Cox), 1 Ves. 1. 3 Atk. 419. *Barret v. Beckford*, 1 Ves. 519. *Richardson v. Elphinstone*, 2 Ves. jun. 463. *Garthshore v. Chalie*, 10 Ves. 1. And so also in case of a

*quasi intestacy*. *Goldsmid v. Goldsmid*, 1 Swanst. 211. 1 Wils. Ch. Rep. 140. *Lord Eldon*, in *Garthshore v. Chalie*, considered that the instrument is to be construed with reference to the circumstance that there is a claim upon the property independent of the covenant; and that where a husband covenants to leave or pay at his death a sum of money to a person, who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that.

As to satisfaction of portions, vide *Warren v. Warren*, post, 305, where all the cases are collected: as to satisfaction of debts by legacies, *Jeacock v. Falkener*, post, 295; and for the general cases upon the subject of satisfaction and performance, Mr. Swanston's note at the conclusion of *Goldsmid v. Goldsmid*.]

EASTER

EASTER TERM.

22 GEO. III. 1782.

EDWARD Lord THURLOW, Lord High Chancellor.

Sir THOMAS SEWELL, Knight, Master of the Rolls.

LLOYD KENYON, Esq. Attorney-General.

JOHN LEE, Esq. Solicitor-General.

LUCAS v. CALCRAFT.

S. C.  
2 Dick. 594.

**T**HIS was a question as to costs, on a case of pure assignment of dower before commissioners, and particularly of the costs of a survey of the estates. Of costs in dower.

*Lord Chancellor* said, that in cases where there is an apportionment of dower by commission, not by writ, costs are not to be given, unless previous questions are raised, in litigating of which the party is vexatious. There are many precedents, and they are reasonable and analogous to the proceedings at law: in a writ of right of dower, or on an assignment of dower, no costs are given, unless there be a deforcement, when the statute (of *Gloucester*) gives damages, or where there are collateral circumstances, as where the dower is demanded upon a feoffment or other title (a).

[(a) The principles here laid down were recognized in the late case of *Worgan v. Ryder*, 1 Ves. & Bea. 20; but as the widow had been there vexatiously kept out of her dower, she was allowed her costs.]

WILLIAM NEWTON, JOHN NEWTON, and }  
NICHOLAS NEWTON, - - - - } Plaintiffs.

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JAMES BENNET, MARY TRYON, Widow, and }  
the Assignees of WILLIAM TRYON, a Bankrupt, } Defendants.

S. C.  
15 Serj. Hill's  
MSS. 299.

**B**ILL filed by the plaintiffs, the residuary legatees of *William Moore*, a creditor of *Thomas Tryon*, deceased, by specialty, which did not bind the heir, against *Bennet*, who was executor of *Moore*, and administrator of the personal estate of *Tryon* unadministered by *Moore*, who was his executor, and against *Mary Tryon* and *William Tryon*, the widow and heir at law, praying, among other things, an account of the personal estates of *Moore* and *Tryon*, and that the estate of *Moore* might be indemnified against debts which he had been compelled to pay, in consequence of having permitted his name to continue in partnership with *Tryon* after

Testator ordered his estate to be sold, and, after giving a legacy to his wife, directs the remainder to be vested in the executors for payment of debts,—the money arising from the sale is equitable assets.

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after his own interest in the trade had ceased, and, if the personal estate of *Tryon* should be insufficient for that purpose, that a sufficient part of the real estate might be sold to discharge the same under the devise of the estate by *Tryon's* will, dated 17th August, 1747, in which, taking notice "that he was indebted to several persons, and was desirous that they should be paid and satisfied, for the more easy accomplishing the same, he desired that his wife would accept of the sum of £5,000 (together with her jewels, &c.) and that all his estates in Kent should be sold forthwith, and (after payment of several sums of money) that the remainder might be vested in his executors for the payment of his debts." He then made several dispositions immaterial to the present question, and appointed *William Moore* and his wife executors. The wife refused the provision under the will, and entered upon the estate for life under her marriage settlement.

The cause being heard before Lord Bathurst, 4th July, 1771, a decree was made, by which it was ordered, among other things, that the real estate should be sold for the payment of debts, and that in case any of the creditors should be satisfied any part of his debts out of the personal estate, such creditor should not receive any thing out of the money to arise by sale of the real estate till his other creditors were paid up equally with him.

*Bennet* being a creditor by specialty, which bound the heir, thought himself aggrieved by this part of the decree, and (the parties agreeing to waive the enrolment of the decree) presented a petition for a rehearing, and insisted that the real estate of *Tryon* (which continued unsold) ought to be considered as legal assets, and applied in a course of administration, in payment of debts by specialty, in preference to simple contracts.

Upon this point the cause was reheard before the present Lord Chancellor, and the question upon the difference between a devise of estates to executors to be sold, and a power given to the executors to sell, was very much agitated by Mr. Price, Mr. Madocks, and Mr. Emlyn, for the plaintiffs; Mr. Kenyon and Mr. Hollist for *Bennet*. At the time of this argument the Reporter was absent, but he has understood that the authorities principally relied upon were as follow:—On the part of *Bennet*—To prove that where an estate is suffered to descend to the heir, though charged with the payment of debts, the produce is legal assets—were cited *Freemoult v. Dedire*, 1 P. W. 429. *Blatch v. Wilder*, 1 Atk. 420. *Allen v. Heber*, 2 Str. 1270. 1 Bl. Rep. 22. Prec. Ch. 127. 136. They contended that it was necessary, in order to make the produce of the estate equitable assets, that the descent should be broken, *Plunket v. Penon*, 2 Atk. 290, and that it was not broken in this case, Co. Litt. 112.—that the statute of fraudulent devises did not affect this case, for the exception in the statute was only where there was a devise to a stranger for the payment of debts, in which case the produce was equitable assets; but where the devise

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devise was to a stranger, *not* for the payment of debts, the assets were legal, not equitable; and said that it was decided by Lord Hardwicke in *Browse v. Abingdon*, 1 Atk. 482, that money arising from the sale of land, under a *mere power* to sell, was legal assets. The counsel for the plaintiff insisted, that in this case the descent was broken, for that was the effect, where there were any circumstances to qualify the descent, to prove this position, they cited *Britain v. Charnock*, 2 Mod. 286. Cro. Car. 161. *Gilpin's case*.<sup>\*</sup> They further cited 3 P. W. 341, *Sir Charles Cox's case*, to prove that this money would be equitable assets, and introduced Dy. 371 b. *Pit v. Pelham*, Sir T. Jo. 26. 1 Leon. 220, as to the effect of such powers; but principally relied upon the case of *Silk v. Prime*, before Lord Camden, on appeal from the Rolls, 8th March, 1768.

Lord Chancellor ordered the cause to stand over, and it came on now for judgment.

Lord Chancellor.—I am of opinion with the late Lord Chancellor, that these are equitable assets (a). There are some inter-

<sup>\*</sup> In *Hargrave v. Tindal*, July 9, 1753, Lord Hardwicke held an estate charged by will with payment of debts, though it descended, subject to the charge, to an infant heir, was equitable assets, and should be sold immediately without the parcel demurring, the same as if it were devised to be sold, though the descent was not broken: for it descended subject to a trust for the creditors.—He therefore decreed the estate to the heir in trust for the creditors, and that it should be sold, and the infants should convey when they came of age, unless they should shew cause to the contrary, in the mean time her purchasers to hold and enjoy (b).

(b) *Kent v. Craig*, 17th December, 1741. Reg. Lib. A. 1741, p. 235.—*Thomas Wriottesley* devised his real and personal estate to his mother after payment of his debts, and it was contended by a bond creditor, that he ought to have a preference to the simple contract creditors, for that there was a difference between a charge and a devise for payment of debts, and that this was a charge only, as in *Fremoult v. Dedere*, 1 P. W. 429. Lord Hardwicke observed, that that case was manifestly different from this, for there was no devise, but the lands were permitted to descend with a charge upon them, and were for that reason legal assets, but here is a devise which breaks the descent, and before the statute of king William the bond creditors could not have affected the lands in the hands of a devisee, and as bond creditors come in by virtue of the exception in that statute (which excepts devises for payment of debts) it would be an extraordinary construction of that statute to make it occasion an unequal distribution amongst the creditors by giving a preference; and his Lordship accordingly ordered the bond creditors to be paid *pari passu* with the simple-contract creditors.

(a) Mr. Serj. Hill, in his MSS. notes upon this case, attacks the decision of Lord Thurlow, and also the judgment of Lord Camden in *Silk v. Prime*, with considerable acrimony. He cites and refers to a great number of authorities, to shew that the descent in the principal case was not broken, and strenuously contends that the assets must at

all events be considered as legal, and not equitable. As it appears (vide note at the end of the case) that Lord Thurlow did not ground his judgment upon the circumstance of the descent being broken, and as the second point is now too firmly settled to admit of any doubt, the Editor has considered it more advisable not to insert them.



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mediate cases \* between the old and modern adjudications, by which it has been decided, that assets to be sold should be considered as if they were already personal estate, and must go in a course of administration. There must be a mistake in the case in 1 Atk. 420, for it was always held, that an estate devised to an executor to sell, was equitable assets.

His Lordship here stated the case.—The devise in the present case is tantamount to giving the executor a power to sell, and to apply the money to the payment of debts. It struck me, at first, it should be so construed. The cases, Dy. 371. 2 Leon. 220. T. Jo. 25, are stronger than the present case, where there is rather an express intention that the estate shall be sold, and the debts paid, than a devise to sell; but I think the difference is not very material. In giving this opinion I have several *dicta* to encounter; 1st. that the descent is not broken, and for this has been cited, Co. Litt. 112; but this I think extraordinary, as, in the very next page 113, the very idea is expressly stated, that where there is a power to sell, the vendee is in by the devisor, by which it appears the descent is broken. It is also argued, that the fee descends in the mean while to the heir till the power is executed, but in the same page of Co. Litt. it is said there is no difference between a power and a devise to sell in this respect, and the whole argument turns on another point, namely, the inconvenience of a power compared with a devise, for that if it be a devise to several to sell, the survivors can sell the estate; but if it is a dry power, the death of one extinguishes it.—I think the descent is broken, and that these are equitable assets, on the authority of Sir Joseph Jekyll, 3 P. W. 341, where he held the equity of redemption of a mortgaged term, to be equitable assets. The doctrine of Sir Joseph Jekyll, in that case, is the very spirit of the statute of fraudulent devises; which applies, not only to dispositions which break descents, but to *any charge*. The practice of the court of equity, that the division among creditors should be *pari passu*, was well known at the time of that decision.—There is no light in which it is possible to set this devise, that will not shew the property to be equitable assets. The only matter urged was, that where money to be raised by the sale of lands was given to executors, it was made personal, and must be applied in a course of administration, 2 Vern. 106; but that doctrine has not been adopted in later times, and must imply that a testator meant differently in giving to an executor than if he had given to any other trustee. In *Lewin v. Oakley*, 2 Atk. 50, Lord Hardwicke determined this point, in the way I now propose, that the gift

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\* Such among many others are those of *Hixon v. Witham*, 1 Ch. Ca. 248. *Whitton v. Lloyd*, ib. 275. *Girling v. Lee*, 1 Vern. 63. *Greaves v. Povel*, 2 Vern. 248. *The Anonymous case*, ib. 405. *Clutterbuck v. Smith*, Prec. Ch. 127. *Bickham v. Freeman*, ib. 136.

either

either way did not make any difference. In *\*Silk v. Prime*, before Lord Camden, he sifted all the cases and settled the point, that the circumstance

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Harg. MSS.

Mus. Brit.

1 Dick. 384.

*\* Silk and others, creditors of Christopher Thompson, plaintiffs, Francis Prime, Richard Moxon, and others, defendants.*

Christopher Thompson, by his will dated 27th December, 1759, gave specific parts of his personal estate to his wife and two daughters, and after reciting that he had, previously to his intermarriage with his wife, settled the reversion of his farm-house and lands, and premises in Outnorton, in the county of York, after the decease of his mother, to the use of his wife for life, in case she should survive him, with remainders over, and that the mother was then living; therefore, he gave to his said wife, in case of his death in the life-time of his mother, an annuity of £60 during the mother's life, to be paid by his executors, and he charged his messuages and premises wherein he dwelt, and his messuage, strith and premises in the High Street, in Kingston upon Hull, and all his estate there, with the payment thereof; and declared that, on the death of his mother, the annuity should cease. And he devised all his lands and premises purchased by him in Outnorton to his mother, her heirs and assigns; and he ordered and directed that all his just debts should be paid, and, in case his personal estate should on account of any losses be rendered not sufficient to pay all his just debts, he charged all his messuages and premises and real estate whatever (except the lands in Outnorton, settled on his marriage, and the lands devised to his mother) with the payment of all his just debts. And in case his personal estate (save what he had thereby given to his wife and daughters) should fall short in payment of all his just debts, he directed that the defendants Prime and Moxon, or the survivor of them, or his heirs, should sell all his messuages and estate in Kingston upon Hull, charged as aforesaid, with his messuages in Wincomely, and his close in Beverley, and all other his real estate (except as aforesaid) or such other part or parts thereof as should, with his personal estate, be sufficient to pay all his just debts, and to apply the money arising therefrom, together with the money arising from his personal estate for the payment of all his just debts. He gave all the surplus money, arising as well from the sale of all or any part of his real estate, as also from his personal estate, to his wife and two daughters, and devised to them all his estate which should not be sold for payment of his debts, and appointed Prime and Moxon executors.

This cause was first heard at the Rolls, 16th and 17th June, 1766, when the late Sir Thomas Sewell determined that the assets arising from the sale of the estate were to be considered as equitable assets, upon the ground that the devise was to the executors and their heirs, observing, at the same time, that it would be otherwise if the devise had been merely to the executors.—He said, by this devise, the descent was broken at law, and the only special circumstance was, that of the trustees and their heirs taking the real together with the personal estate.—From this decree there was an appeal to the Lord Chancellor, who, on the 8th of March, 1768, affirmed the same, and delivered a very elaborate argument, to the following purport, of which the Reporter has been so fortunate as to obtain a very accurate note:—

*Lord Chancellor.*—When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the cases, to see what general rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case.

Where trustees for the payment of debts are made executors, the printed cases had ruled the assets to be legal.—This caused me to doubt, because I had always understood the doctrine of this Court was the reverse, and, therefore, I thought it necessary to look back to the origin of this business, and to fix the principle.

Where an estate is devised to trustees for the payment of debts generally, it has long been the constant practice of the Court, to pay all the debts *pari passu*. This is declared in the case of *Woolestoncroft v. Long*, 1 Ch. Ca. 32. And the same is again laid down in 3 Ch. Ca. 54. *Anon.*



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circumstance of giving the real estate by any means to the executor, shall not occasion the produce of it when sold, to be applied as

As the money, in these cases, never reaches the hands of the executors, no action lay: And the creditor was obliged to come into this Court for satisfaction.

Whereupon, equity not being tied down to the rule of law, introduced a new method of administration.—And, seeing the testator had made no distinction between the difference of securities given for the payment of debts, the Court conceived that the testator meant to do equal justice to all his creditors.

Nor did the Court, in this respect, do any injury to specialty creditors.—For, though real estates are assets, at law, to pay such debts, yet the creditor might be defeated by the debtor's will, or the heir's alienation.—So that where the will had set aside the law, equity would have forgot its own principle of equality, by giving a priority, which the testator had not done;—all debts being equal in conscience.

Upon this ground, the statute of fraudulent devises allowed devises for the payment of debts to be good, though the act annulled every other devise to the prejudice of specialty creditors.

This, I consider as a parliamentary approbation of equitable assets, which, standing as it does, upon such ground of justice, the testator's intention, the rule of equality, and the sanction of the legislature, ought always to preponderate, in a doubtful case; and Sir *Joseph Jekyll's* opinion in *Cox's* case, 3 P. W. 344, should be always remembered, who said, he would always do his utmost to extend the rule.

Where the trustee is not executor, the case is clear.—

Where the land is charged with the debts, it is clear likewise.

But, where the testator put the trust into the executor's hands, there was a considerable doubt, how to distinguish the capacities of the two characters; as executor, the assets were legal; as trustee, they were equitable.

The law had determined, that where the land was devised to be sold by executors, or devised to executors to be sold, in both cases the assets were legal. In this respect, the law made no difference between the interest and the power, and that is evident. Any person who will peruse Co. Lit. 112 b. 113 a. with any attention, will be of that opinion, and all the cases in Ro. Ab. under that head, speak the same language.

These kind of devises had been so frequent at law, and the determination so uniform, that they seemed, for a time, to have overpowered the courts of equity; for I find that almost all the printed cases followed this rule, and made the assets legal.

So is *Girling v. Lee*, 1 Vern. 63. *Anon.* 2 Vern. 133. *Greaves v. Powell*, ib. 249. Two strong cases in Prec. Chan. *Chutterbuck v. Smith*, 127. *Bickham v. Freeman*, 136. Bunb. 339. *Lord Masham v. Harding*.

Lord King, in the case of *Walker v. Meuger*, Mos. 204, which I don't well understand, avoided the point.

These authorities did perplex me exceedingly, for I had, all my time, taken it for granted that the rule here was otherwise.

At last I find this note in Mr. *Tracy's* book, *Lewin v. Oakeley*, 2 Atk. p. 50.

July 26th, 1740. "Devise to trustees for payment of debts, and the same persons are made executors.—The assets, said the Court, shall, notwithstanding, be equitable and not legal. There are cases in *Vernon* where it is held, that debts in such cases shall be paid in a course of administration, but the modern resolutions have been otherwise."

I sent to the Register's book, and find, that was the very point of the cause; and, upon the Master's report, Lord *Hardwicke* determined that the simple contract, and the specialty debts, should be paid *pari passu*.

The words of the will were: Testator devised his estate to A. and B. and their heirs in trust, to sell the same, and thereout, in the first place, to pay his debts, and appointed them executors.

And now, I think, the whole rule is overthrown, and that whenever the land itself is devised to the same persons who are executors, the assets will be equitable.

And

as it would in the ecclesiastical court, but it must nevertheless be considered as equitable assets.—The decree is right, and must be

And I hold the case to be the same whenever the land is devised to them, or to them and their heirs, for in both cases they are equitable trustees. The descent is broke, and the specialty creditors have lost their fund.

And I can hardly now suggest a case where the assets would be legal, but where the executor has a naked power to sell *quâ* executor.

What I have said shews that this Court has justly a partiality and predilection to equitable assets, which ought to turn the scale in all cases where the matter hangs in equal balance.

This disquisition is, therefore, not proper, though it must be admitted, that, in the present case, the trustees and executors have no more than a naked power; for nothing is devised to them, and, therefore, the doctrine I have laid down is not directly applicable to this case; but two rules are obtained.

1. It is a good rule of expounding wills, to make them speak in favour of equitable assets, if it may be done.

2. That if you can lodge the assets in the hands of the trustees, the Court will never put them in the hands of the executors, and when one person is invested with both characters, the trustee shall be preferred.

To come to the case.

1. The testator's will does most emphatically direct the payment of all his just debts.

I can never think, that a man who does, repeatedly, and so anxiously, provide for the payment of *all*, could ever mean, by legal preference, to pay *some*, and leave the rest unpaid.

2. The power is lodged not in executors solely, but in them or *their heirs*; and it is clear that the money could never be assets in the hands of the executor's heir, nor could the creditor ever maintain his action against such heir.

Nor is it any answer to this objection, to say, that the word *heir* is inserted by mistake, or to be resembled to those cases where personal estate is given to a man and his heirs, or real estate to a man and his executors.

In those cases, the subject matter of the devise points out the proper succession, and the literal will is nonsense.

But here, the word *heirs* has a useful and proper meaning, for it converts the executor into a trustee, and makes the assets equitable, which is a favourite point in this Court.

But it has been said, that the testator has, here, united both funds together in the hands of his trustees and executors, and therefore both must be one consolidated fund, to follow the same course of administration.

For the words are, that they shall apply money arising from the real estate, together with the monies arising from his personal estate, to pay, &c.

The answer is, that in all cases, where the trustees and executor are one person, the funds are consolidated in the same manner—for, out of both, he is to pay all his debts.

But the course of administration is different, and, by that very method, it is, that the Court is enabled to pay all the debts without distinction, as far as the assets will go, and, by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator.

3. This is the case of a charge upon the lands.

They are devised to the testator's wife and daughters subject to this charge.

In this respect it is a trust, and no more to be sold than what is necessary for this purpose.

The power, then, to sell is merely consequential, the testator having named the executor for this purpose. The Court would have compelled the devisees.—Whoever sells to satisfy a charge must be a trustee, because a charge is a trust.

To make this still clearer,

The rents and profits in the hands of the devisees are assets before the sale. Legal assets they cannot be, for the executors have no right to receive them. They must therefore be equitable assets.

And, if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout.

*Decree affirmed.*

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affirmed:—As it happens other creditors have obtained \* similar decrees as to this very estate, which stand unimpeached (a).

*Decree affirmed †.*

\* Three other causes had been heard, viz. *Spencer v. Moore*, before Lord Hardwicke; *Bethel v. Moore*, before Sir John Strange; and *Yard v. Moore* before Lord Northington, upon this very will, and the question determined in the same manner with the present.

† The case of *Barker v. Boucher*, which was on several times at the Rolls, but particularly, as to this point, on the 15th day of July, 1784, was thus; Robert Burton made his will, containing, among other things, the following direction; “as touching all such real and temporal estate, as it hath pleased Almighty God to bestow upon me, I give and dispose thereof as followeth; first, my will is that my debts and funeral expences be paid and discharged by my executrix; my will is that my executrix shall sell three closes out of my estate at Hessey, called *Knapton Moor Closes*, to pay my debts,” and made his wife executrix. The personal estate was deficient, and, upon a bill filed by the plaintiff, a simple-contract creditor, on behalf of himself and the other simple-contract creditors, his Honor was pleased to declare that the money produced by the sale, and the intermediate rents of three closes ordered to be sold, were to be considered as equitable assets, and ordered the same to be paid *pari passu*, among the creditors, whether by specialty, or simple contract. See to the same purpose, *Baton v. Lindgreen*, vol. ii. p. 94.

(a) The report of this case has been repeatedly stated to be inaccurate, in representing Lord Thurlow as having intimated, that to make equitable assets, the descent must be broken; and in the case of *Burt v. Thomas*, in the Exchequer, cited 7 Ves. 321, Mr. Baron Thompson stated, from his own note of this case, that the report was inaccurate in this respect, and that Lord Thurlow expressly considered a charge as sufficient. Lord Eldon also has, from

his own memory, confirmed this representation, being confident that Lord Thurlow's opinion was, that a charge was a devise of the estates in substance and effect *pro tanto*, upon trust to pay debts. The point has been now so repeatedly decided, that no doubt whatever can be entertained upon it. *Bailey v. Elkins*, 7 Ves. 319. *Shepherd v. Latwidge*, 8 Ves. 26. *Pope v. Gwyn*, cited *ib.*

### WIRDMAN v. KENT.

S. C.  
2 Dick. 594.

*Appeal from the ROLLS.*

There shall not be an appeal or rehearing for costs only.

THIS was a bill by trustees of *John Smith*, to whom he had conveyed estates to be sold for payment of debts, against the defendants the purchasers of certain lots, and against *John Smith* himself, for specific performance of this agreement, for the sale of the premises; defendants by their answers, objected that the plaintiffs could not make a good title, and in particular, that the terriers, delivered by the plaintiffs, were so incorrect, that several parts of the lands could not be found; that other parcels were

were stated to be freehold, which turned out to be copyhold; and that the lots were terriered to them which were sold to another person; and others not the property of *John Smith*, but of his father. Upon the hearing, it was referred to the Master to see whether the plaintiffs could make a good title.—Before the Master, the several objections were taken, but he not thinking it competent to him to go into them, the parties agreed to state the facts, in a paper to accompany his report, that plaintiffs could make a good title; and a decree was made for a specific performance, and, as to the lands terriered to defendants, but which had been sold to one *Pavey*, that the plaintiffs should procure *Pavey* to release them to the defendants, or convey a like quantity of land of equal value to the defendants, but without costs on either side. From this decree, the defendants appealed to the *Lord Chancellor*, on the ground that, although the agreements were entered into in 1774, they were in possession of no part till 1780, and the plaintiffs had not yet enabled themselves to complete their part of the agreement, that therefore, from the difference of value of lands and money, between 1774 and 1780, the defendants ought not now to be compelled to perform them: that the decree was wrong in compelling the defendants to take other lands instead of those terriered to them, but sold to *Pavey*, in case *Pavey* should refuse to release them, (which as yet he had only done conditionally, and the condition not performed) and, particularly, that they ought to have their costs, the suit being by the plaintiffs, who could not perform their part of the contract, and the costs thereof part of the expence of making out the title.—And (c) this seeming the serious ground of appeal, *Lord Chancellor* dismissed it, and affirmed the decree; saying, the case in *Vesey*, (*Owen v. Griffith*, 1 Ves. 250.) where the appeal for costs was admitted, was, upon such an apparent mistake, that, upon motion before enrolment, the minutes of the decree would have been altered, and affirmed the doctrine of *Lord Hardwicke* in that case\*.

(c) The serious ground of appeal, was the difference of the value of land and money, between 1774 and 1780, increased by the injury the estate had received in the mean time.

\* There was a case *Cooper v. Scott*, before *Lord Henley*, November 19, 1757, a rehearing after a decree by *Lord Hardwicke*, in which costs came to be the only matter in dispute. The question was, whether there could be a rehearing for costs only, and a difference taken at the bar, between the case of costs, charged on the person (where it was admitted there should be no rehearing) and costs out of the estate, and *Owen and Griffith* was cited. *Lord Keeper* said, a rehearing for costs only ought not to be encouraged, because they are merely discretionary, and depend on circumstances, but thought there might, on particular circumstances, be such rehearing.—He affirmed the decree. Vide *Gibson v. Ratterson*, 1 Atk. 12. post, vol. iii. 329. *Mackreth v. Marler*, cited post, vol. iv. 32. *Vernon v. Stephens*, 2 P. W. b. 6. and *Langford v. Pitt*, ibid. 669, and *Morgan v. Scudamore*, 2 Ves. jun. 313 (a).

(a) The case of *Cooper v. Scott*, has been since reported, 1 Eden, 17. Et vide *Williams v. Byron*, should be *Binning*, in Scac. 27th Jan. 1792. cited 2 Dick.

595, and 10 Ves. 572. As to revivor for costs, vide *Hall v. Smith*, post, 438, and the note to it.

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MSS. 139.

Words of desire,
or request, in or-
der to raise a
trust, must have
a precise and dis-
tinct object.

HARLAND v. TRIGG.

RICHARD HARLAND, being seised in fee of the manor of *Sutton*, in the county of *York*, and having four sons, *Philip*, *John*, *Richard*, (the plaintiff) and *Francis*; by his will in 1747, (devised the said manor (with other lands) to *Philip*, the eldest son, for life, with remainder to his first and other sons in tail-male, remainder to *John*, the second son, for life, remainder to the plaintiff, for life, remainder to *Richard* for life, with like remainders to their several first and other sons, and with further remainders over. *Richard*, the father, died in 1750, *Philip* entered, and, being himself also possessed of leasehold estates in *Sutton*, some for lives, and others for years, by his will, made in the year 1764, gave his leasehold estate for lives to the trustees of his father's will, to the same uses to which the lands devised by the father's will were limited, so far as by law he could: and then followed this clause, "And all other my leasehold estates in the parish or township of *Sutton*, I give to my brother *John Harland* for ever, hoping he will continue them in the family." *Philip* died in 1766. *John* entered on the estate and died in 1772, having made his will and given these leasehold estates to his widow, whom he made executrix, and who since married the defendant *Trigg*. *Richard*, the third son, filed this bill, insisting the devise in *Philip's* will subjected these estates to the same uses as those declared by the father's will, that he was therefore entitled to the next estate in remainder, and praying that it might be so declared.

Mr. *Attorney-General*, Mr. *Madocks*, Mr. *Ainge*, and Mr. *Spranger* contended, that *John* had an estate only for life; they argued, that a request in a will is sufficient to raise a trust, and is equivalent to a devise, for this they cited *Harding v. Glynn*, 1 Atk. 469.—The case upon the will of *Wortley Montague*, in the House of Lords*,—*Richardson v. Chapman*, also in the House of Lords, (5 Bro. P. C. 400) (b), and contended that, here, the intention must be that the estates should go to the uses in the father's will.

Lord Chancellor.—I have no doubt but a requisition made with a clear object, will amount to a trust. In the case of the Dutchess of *Buckingham's* will, the words were very gentle, but had a distinct object. But where the words are not clear, as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used

* *Earl of Bute v. Stewart*, 5 Bro. P. C. 534 (a).

(a) Ed. Toml. vol. i. 476. Vide (b) Ed. Toml. 7. 318.
2 Eden, 87.

apt words; therefore, where he has not used such words, he had a different intent.

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Mr. *Mansfield* and Mr. *Lloyd*, for the defendant, argued, that by the word *family*, he had not pointed out any particular branch of the family; although relations is a well known technical word, family is not; the devise would have been satisfied by giving it to any branch of the family. They further observed, that in the former devise he had given the lands he meant to go together, to trustees, in accurate language, and that, if he had intended these estates to be under the same trusts; he would have used the same words.

Mr. *Attorney-General* in reply, insisted, here was a manifest attention to the object contended for by the plaintiffs, from the circumstance of the testator's passing by his daughters and giving it to *John Harland*. This shewed that by family, he did not mean children, and said that, if the subject of the devise had been personal property, as the goods in his house, it would have been sufficient to have made those goods heir-looms.

Lord Chancellor.—I think every will ought to be construed according to the intent of the testator, where it can be collected. In order to make a title, the plaintiff states, that the father had settled his estates in strict settlement, and insists that I shall understand this devise as giving the leasehold estates to the same uses as nearly as their nature will admit. The testator gives other estates to trustees, subject to charges, to the uses in that settlement; he, therefore, understood how to make his estates liable to those uses, and intended something different here. The argument is, that there will be part of the will ineffectual, the words *hoping that he will continue them in the family*: the answer is, that the words are precatory, not imperative. Another argument made use of is, that, if this was furniture, the devise would carry it; but if so, it would be on this ground, that he recollected that the house would pass, and meant the furniture should remain attached to it under all its limitations;—that case has peculiarities that do not occur here. It would be a great deal too much to tie this up as a strict settlement. I had a doubt whether the family could not claim some interest in the subject, but, when I came to consider, I take the rule of law to be this, that two things must concur to constitute these devises, the terms, and the object. *Hoping* is in contradistinction to a direct devise—but, whenever there are annexed to such words, precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust;—but then the objects must be distinct:—where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee,
or

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or if he had given them to any one part of the family, the others could have no remedy. The will does not import a devise, as the words do not clearly demonstrate an object. I am therefore of opinion, that the bill must be dismissed\*.

\* According to the doctrine of this case several others have been determined, *Mason v. Low*, Tr. 8 Geo. 2.—*Hands v. Hands*, Rolls, 24th June, 1782.—*Wynne v. Hawkins*, post, 179.—*Nowlan v. Nelligan*, post, 489, and *Peirson v. Garnet*, post, vol. ii. p. 38. 226, and Finch's Pre. Ch. 201, with the cases there cited, in which the whole doctrine is investigated. Vide *Malin v. Keighley*, 2 Ves. jun. 333. 529 (c).

(c) See the note to the case of *Peirson v. Garnet*, post, vol. ii. p. 226.

S. C.  
 2 Dick. 596.

### SAMWELL v. WAKE.

In order to exonerate the personal estate from the payment of debts and legacies, it is necessary, not merely to charge the real estate, but the will must exempt the personal estate.

SIR Thomas Samwell, by his will, devised as follows: "I will and desire that my debts and legacies shall be paid, and, for that purpose, I charge all my estates with the same, and that it may be more easily done, that Sir William Wake and John Peach Hangerford (the defendants), and their heirs, shall sell the estate, and apply the money to the payment of debts and legacies, and that it may be lawful to them to pay out of the rents and profits, or to raise the money by mortgage," and, subject to the debts and legacies, he devised to the plaintiff (his natural son) for life, with remainders over: he then gave several pecuniary legacies, and gave the residue to the plaintiff. The plaintiff filed this bill to compel the trustees to pay the debts and legacies out of the real estate, insisting that he took the personal estate exonerated of them.

Mr. Mangfield, Mr. Madocks, and Mr. Holist, for the plaintiff, argued, from the frame of the devise, that the testator seemed sedulous to throw the burthen of the debts and legacies upon the real estate, and to exempt the personal.—They contended that no reason was given, in any of the cases, for charging the personal estate, except that it was the primary fund, and therefore to be applied, unless where the testator had shewn it to be his intention to exempt it, and substitute another: but, where such intention appeared, that rule did not apply. For this they cited *Adams v. Meyrick*, 1 Eq. Ab. 271.—*Wainwright v. Bendlowes*, 2 Vern. 718.—*Stapleton v. Colville*, For. 202.—*Kynaston v. Kynaston*\*.—*Philips v. Nicholas*, 1774, where it was so determined in the case of a widow with a very large jointure.—*Anderson v. Cooke*†, in 1775, where part of the lands were ordered to be sold to pay debts, and the residue of the personalty given; the charge was held to

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\* Stated post, p. 457, n.

† Stated post, p. 456, n.

exempt



exempt the personal estate: and *Holliday v. Bowman*, 6th December, 1776, where *William Chapman* devised a manor to trustees, in trust to sell, and directed the monies to be raised thereby, to be paid in discharge of all his debts, and after payment thereof, in the first place, to invest the residue, and pay the interest to his wife for life, and the principal, after her decease, to his nephew, and, after several specific and pecuniary legacies, gave to his wife all his goods and chattels, and appointed her executrix. Upon a bill brought to establish the will, and to have the manor sold for payment of the debts, the widow insisting the personalty was exempted, *Lord Chancellor* at first thought it was not, but, upon considering the cases, and especially that of *Kynaston v. Kynaston*, decreed that the personalty was exempted from the debts, but was subject to the funeral expences and legacies, and decreed accordingly. They further observed, that, in the present case, the personalty was very small, only about £500, and the debts so considerable, near £13,000, that they must swallow it up, and render the bequest totally nugatory, a circumstance which had been relied upon in the decision of a similar case, *Bamfield v. Wyndham*, Pre. Ch. 101, where *Lord Chancellor* took notice, that the debts were more than the personal estate amounted to, and, therefore, that the testator must mean his wife to have it exempted from his debts, or he could mean nothing.

*Mr. Newnham* was beginning on the other side, but *Lord Chancellor* stopped him.

*Lord Chancellor*.—I believe it is very clear, that here is not enough to exonerate the personal estate. The personal estate is the proper fund,—in order to exempt it, the testator must express his intent. It is not sufficient to charge the real, but he must shew that his purpose is, that the personal should not be applied. The words to be attended to are those relative to the personal estate.—He gives pecuniary legacies, and then, by a very loose clause, gives the residue to *Samwell*. I am called upon to construe the most large and loose residuary clause that ever was seen, in such a way as to change the natural order of payment. Where the intent is strongly expressed, and it is for near relations, old cases have carried the matter farther than good sense, without precedents, would have done; but none of the cases apply to the present. Therefore the personal estate must be first applied to the payment of the debts and legacies\*.

\* See *Webb v. Jones*, Easter, 1786, vol. ii. p. 60(a).

(a) See the case of *The Duke of Argyll v. Mayer*, post, 454; in the note to which all the cases upon this subject are collected and arranged.

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## CLIVE v. WALSH.

Lord Clive provided by his will a maintenance for his second son out of the real estate; he afterwards gave large legacies to his younger children, with maintenances out of the interest, the second son entitled to both maintenances.

**T**HE late Lord Clive, by his will, devised a specific landed estate to trustees, for a term of years, with remainder to his son Robert (his second son) for life, with remainders over. The trusts of the term were to raise a maintenance till twenty-one, then to pay him an annuity of £1,000 till he should attain the age of twenty-five years, when the estate was to vest in possession, and to apply the savings to form a personal fund for other purposes. He then gave his personal estate also to trustees; he gave to Robert, and each of his younger sons, £30,000, and to each of his daughters £20,000 at twenty-five, in the mean while to raise maintenances till twenty-one, and from thence to pay £1,200 *per annum* to the boys till twenty-five. Lady Clive filed this bill to have the two allowances for the second son during his minority.

*Lord Chancellor.*—There is not sufficient in this will to extract any thing from it, but what is expressed. The trust of the term is to raise maintenances, but there is a further intent to take the profits till twenty-five, and convert them into a personal fund for other purposes, and to provide an annuity till that age. The personal estate is to be laid out in good securities, and out of it he provides £30,000 for Robert, he having then no other younger son; no interest is to be allowed, but a maintenance, so that Robert was, as to that maintenance, in contemplation, as well as the other younger sons. The argument that he shall not have this, because he has another provision, would apply equally to the annuities from twenty-one till twenty-five, and no one could say he was not to have the two annuities. He has given more by way of maintenance to the son, to whom he has given a larger estate. It must be referred to the Master what allowance should be made, and the rest must accumulate for the use of Robert (a).

(a) See the case of *Ridges v. Morrison*, post, 389, and the cases there cited.

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## DUFF v. DALZELL.

Will, made under a power, but not duly attested to pass real estate, a good execution of the power *quoad* the personality.

**G**IBSON DALZELL, by will, had given several shares in the Sun-fire office, to Frances Dalzell, his daughter, and, after her decease, to such persons as she by her will should direct. He also devised real and personal estate in Jamaica, in moieties, the one moiety to Frances for life, and, after her decease, to such person as she by will should direct, the other moiety to Robert in like manner. Frances, by her will, reciting that of her father, disposed

disposed of the *Sun-fire* shares, and also, by that will, devised the real estate, but the will was not duly executed to pass the latter, being in the presence of two witnesses only.

Mr. *Mansfield* insisted the power was ill executed, because she had given the real estate to one child only.

Mr. *Scott*, on the same side, said, that it was taken for granted, in several cases, that, where the power is to be executed by will, it must be a will executed according to the statute of frauds, for the testator meant the instrument to be such as would dispose of the real estate.

Lord Chancellor over-ruled the distinction, and said, the will being sufficient to pass the personal estate, seemed a good execution of the power so far (a).

(a) Vide Sugd. on Powers, 223.

### HEATH v. HEATH.

*This stood for judgment on an exception to the Master's report.*

S. C.  
15 Scrj. Hill's  
MSS. 313.

**L**ORD Chancellor.—This is a bill for specific performance of an agreement for the purchase of an estate, the question arises upon the title, whether the plaintiff, by the will of *Edward Heath*, can make good a title to the purchaser. *Edward Heath* gave to *William Heath*, his son, all his estate, until *Edward Heath*, the plaintiff, should attain his age of twenty-two years, and no longer:—he afterwards says, *item*, I give and bequeath unto *Edward Heath*, all my messuages in *Hemblington* and *Clofield*, for ever, that is, if he have a son or sons, who shall attain twenty-one, but, if my kinsman *Edward Heath* should chance to die without son or sons to inherit, my will is that the son of my son *William Heath* shall inherit. The question is, what estate *Edward Heath*, the plaintiff, took by virtue of this devise.—Of all the constructions which have been put, there are only two attended with any probability of being true. 1. That he had an estate-tail, and this is the construction put by the Master's report. In order to do this, the words must have been understood as stopping at *Edward Heath*, and then "for ever, if he have a son, &c." would be a contingent fee-simple on his having a son to attain twenty-one. If so, the fee-simple would never vest in *Edward Heath*, unless the son should attain twenty-one during his life, so that at present it would be only an estate for life.—2. But the words are capable of a greater extension

Devise to *E. H.* for ever, that is, if he have a son or sons who shall attain twenty-one, but if *E. H.* should chance to die without son or sons to inherit, my will is that the son of my son *W. H.* shall inherit. This is a fee-simple to *E. H.* with an [ 148 ] exec- tory devise to the son of *W. H.*

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sion by implication; as, where an estate is given to one for life, but if he shall die without issue male, remainder over, it will make an estate-tail, and I suppose, by the devise over, it was held to be a fee-tail, with a contingent fee upon the clause, or a substituted fee, in the room of the fee-tail. This latter is so new that I could not adopt it, but would support the Master's report. It appears the intention was, generally, to give the estate to *Edward Heath*, but that if he had no son capable of inheriting, then that the estate which he had given absolutely, should go to another designation of heirs, and this is the true idea of an executory devise, which is where the testator gives absolutely, but upon an event to happen, gives to another designation of heirs. This construction will carry into effect as many of the words made use of to express the testator's intent as may be. It would be quite new to sever the words "for ever," &c. from the gift. Then it is a gift of a fee. But what is to be said of the words, if he shall have a son who shall attain twenty-one? It would be harsh to say they shall suspend the fee. It appears, therefore, that at twenty-two it did vest in *Edward*, and the clause must not be taken by itself, but as part of the former.—If he shall have such son—but if he shall not—which I interpret—have such son, then to the son of *William Heath*. Then the effect will be—that it is given for ever; but if *Edward* should die without issue, or the issue should not attain twenty-one, then over. If this is the true construction, it is a fee to *Edward Heath*, subject to an executory devise, which he at present cannot by any conveyance defeat. For a Court of Equity to compel a party to take an estate which it cannot warrant to him, would be an extraordinary proceeding. *Edward*, therefore, cannot make a title, and the exception must be allowed (a).

(a) Vide *Fearne's Ex. Dev.* 434. Also *Porter v. Bradley*, 3 T. R. 143. *Ree*, dem. *Sheers v. Jeffery*, 7 T. R. 589. *Doe*, dem. *Barnfield v. Wetton*, 2 B. & P. 324. *Eastman v. Baker*, 1 Taunt. 174. *Doe*, dem. *Smith v. Webber*, 1 Barn. & Ald. 713. A similar construction was

contended for in the late cases of *Truay*, dem. *Agar v. Agar*, 12 East. 252. and *Sir Samuel Romilly v. James*, 1 Marsh. 592. But the Court held the devises over to be remainders limited after estates tail by implication.

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FRANCIS BARKER, Student of *Wadham College*, } Plaintiff.  
*Oxford*, - - - - - }

JOHN VANSOMMER, a Silk-throwster, JAMES }  
 VANSOMMER and PETER PAUL, Mercers, }  
 PETER PRITCHARD, FRANCIS RYBOT, and } Defendants.  
 GILES, Personal Representative of—ALCAN, }  
 a Jew, - - - - - }

**PLAINTIFF**, wanting to raise a sum of money, immediately after his coming of age, applied to *Alcan*, a Jew, for that purpose; *Alcan* recommended *Pritchard*.—The plaintiff told *Pritchard* he was of age, and wanted £1,500. *Pritchard* told him that *Vansommer* and *Paul* would let him have goods to that amount, which he might afterwards dispose of.—Upon *Pritchard* applying to *Paul*, *Paul* took some days to enquire into plaintiff's circumstances and age, and was then satisfied; the plaintiff was entitled to an estate of £1,200 in reversion, and likewise about £5,000 in money. *Vansommer* and *Paul* agreed to let the plaintiff have silks to the amount. The plaintiff went to choose the silks, and *Alcan* attended, recommended some silks and objected to others—*Vansommer* and *Paul* packed up silks to the amount of £2,224, and desired the plaintiff to take them all—the plaintiff gave a note as follows, "I promise to pay to Messrs. *Vansommer* and Co. or order, the sum of £2,224, on the 13th day of *December*, 1778, for value received, this 14th day of *December*, 1777, by me *F. Barker*, of *Wadham College*, *Oxford*." The silks, amounting to 1777 pieces, were sent and delivered to *Alcan* by the plaintiff's directions; *Alcan* introduced *Rybot* as a person to buy the silks. *Rybot* offered £1,000 for all the silks, or £700 for the plain ones alone—both these were rejected, but the plaintiff afterwards sold him part of them for £600, the remainder were taken away, and put up to auction, without plaintiff's knowledge, and bought in by *Rybot* for £199.—The promissory note was afterwards indorsed to the defendant *John Vansommer*, by the defendants *James Vansommer* and *Paul*, in payment of a balance of £824, due from *Vansommer* and *Paul* to *John Vansommer*, and *John* gave his note of hand (not negotiable) for the remainder of the £2,224.—The bill was brought to compel the defendants to deliver up the plaintiff's promissory note, upon payment of what the silks really produced upon sale, &c. *John Vansommer*, by his answer, says, that the promissory note was indorsed to him, upon a balance of an account then subsisting between him (as a silk-throwster) and the other defendants *James Vansommer* and *Paul*, and denies any notice of fraud, or any dealings with *Pritchard*, *Rybot*, or *Alcan*; *James Vansommer* and *Peter*

Bond, given for silks taken up in order to sell to raise money, to be delivered up, upon payment of the sum really raised.

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*Peter Paul*, by their answer, deny any knowledge of the circumstances previous to the 24th *December*, 1777—say that *Pritchard* then applied to the defendant *Paul* for some silks, that the defendant *Alcan* chose the silks, admit the note, say that the silks were in good condition, and sold at a fair price, deny all knowledge of the subsequent transactions with *Rybot*, say they do not know what became of the silks afterwards, that they never promised the plaintiff not to negotiate the note, that they indorsed it in payment of £824 to *John Vansommer*, and that the remainder was made up by a note from *John Vansommer*. By their further answer they say, that all the old fashioned silks were, on that account, sold considerably under prime cost.—*Francis Rybot*, by his answer, admits that he was sent to by *Alcan* to see the silks, that the next day he saw *Alcan* and *Pritchard*, and offered £1,000 for the whole, which was refused, that he afterwards bought part for £700, and paid it; that £700 was the full value of what he bought; that he afterwards purchased more of them for £199.—*Alcan*, by his answer, admits that he was present at the sale of the silks, that he looked over them for the plaintiff, that he brought *Rybot* to purchase them; says that the remainder of the silks were taken away by *Rybot*, in consequence of his having advanced a further sum of £150 to the plaintiff.

Mr. *Scott*, for the plaintiff, argued, that the plaintiff was entitled to the relief prayed, and cited the case of *Cecil v. Sutton and Rowntree*, in the Exchequer. There the defendants supplied the plaintiff with goods, in order to enable him to negotiate a note. The Court of Exchequer granted an injunction, till the amount which the goods sold for should appear.—In *Lord Polwarth v. Cooke*, Lord *Polwarth* had applied to *Cooke* to obtain £150. *Cooke* gave him £60, a gold watch, and a *Cremona* fiddle; the Court ordered an enquiry into what money Lord *Polwarth* really obtained by the sale, and, upon payment of that sum, ordered the securities entered into to be given up.

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Mr. *Erskine* and Mr. *Lloyd*, for the defendants, contended, that, in the case of *Lord Polwarth v. Cooke*, the transaction was merely borrowing money, whereas here the contract was *emptio & venditio*, and endeavoured, by that means, to distinguish it from the other case mentioned by Mr. *Scott*, and also from the case of *Skyrme v. Rybot*, where *Skyrme* was introduced by *Lee*, a broker, to *Rybot*, to borrow money; *Rybot* agreed to lend him £600 on a bond, and warrant of attorney to confess judgment. He advanced £200 in cash, and the remainder in goods. The decree was to take an account of the money really and *bonâ fide* advanced or paid for the use and benefit, or which had come to the hands of the plaintiffs, and, upon payment thereof, the bond and warrant of attorney to be delivered up.—They cited *The Duke of Ancaster v. Pickett*, where



where jewels were sold by *Picket* to the Duke, who sold them again for less money, and the Court of Exchequer would give no relief.

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*Lord Chancellor* stated the case. Upon these circumstances, it comes to me to determine upon the complexion of the transaction. It is argued by one gentleman, that this was a mere sale, that therefore the Court cannot look into it. I allow that if this was in the common course of trade, it would be so. That was the reason upon which the Court of Exchequer refused relief in the Duke of *Ancaster's* case (*a*). But I am to enquire whether, under the mask of trading, this is not a method of lending money at an extraordinary rate of interest. There is no doubt that if they had talked of this as a loan of money, there would have been an end of the case. The question then is only whether there is any method of shewing the Court that they meant so, short of their treating of it as such in plain language.—There is not a doubt that, in this case, the transaction was merely for the purpose of raising money to supply the necessities of this young man. Do they deny knowing the goods were to be sold? I take it, therefore, as an advancement of goods, instead of money, to supply his necessities (*b*). It is a question of more difficulty, what is the sum of which the account is to be taken, whether the value of the goods, or the sum really made. In the case in *Eq. Ab.* 91, the Court thought proper to charge the person only with what he really made of the goods; and this is the proper rule, for the person advancing the goods knows they are not to be sold in the shop, but in the lump, at a different kind of market, and that what can be got for them, in that way, is all that will redound to the benefit of the party to whom they are advanced; this lays out of the case the value they were of to be sold in the shop. His Lordship directed an account of what silks came to the hands of *Rybot*, and under what contract, and with what privity, and also of the value of the other goods, and an enquiry as to the indorsement of the note to *John Vansommer*, from *Vansommer* and *Paul*, and reserved further directions.

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(*a*) See *Murray v. Harding*, 3 Wils. 395, and the observations of *Gibbs*, C. J. in *Doe v. Metcalf*, 1 Holt, N. P. C. 295.

(*b*) In all these cases, the question is, what is the real substance of the transaction, not what is the colour and form. Where a party is compelled to take goods, a presumption arises, that

the transaction is usurious, his object being to procure cash, not to encumber himself with goods. *Richards v. Brown*, Cowp. 770. *Lowe v. Waller*, Dougl. 735. *Pratt v. Willey*, 1 Esp. N. P. C. 40. *Rich v. Topping*, ib. 176. *Davis v. Hardacre*, 2 Campb. N. P. C. 375. Comyn on Usury, 94, et seq.



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## WILLIAMS v. WILLIAMS.

Covenant, in an infant's marriage settlement, that whatever should come to the wife from the mother, or otherwise, shall be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters. To bind an infant, the marriage settlement must be fair and reasonable; not tend to deprive her of every thing.

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**BY** indentures previous to the marriage of *Jeffery Williams* and *Frances Jackson*, an infant, bearing date 10th of June, 1745, it was agreed, that £700 advanced by *Jeffery Williams*, and £700 advanced for *Frances Jackson* by her uncle, who was her guardian, and had not accounted for her fortune, should be laid out in lands, which should be settled upon *Jeffery* for life, with remainder to trustees, to pay £40 per annum to *Frances* for life, remainder for a term of years, to raise £600 for younger children, remainder to first and other sons in tail, remainder to daughters, &c. In the deed there was a proviso, by which *Williams* covenanted that all sums of money, &c. which should come to *Frances*, or to him, in her right, from the mother, or otherwise, should be applied or vested in trustees to the same uses with the £1,400. The mother, by a deed, 29th December, 1746, in consideration of love and affection, conveyed an estate to the use of herself for life, remainder to *Thomas Jackson* (her son) in tail, remainder, as to a moiety, to *Frances* for life, remainder to her first and other sons, with power of revocation. *Thomas*, the son, having become lunatic, the mother, by her will, revoked the deed, and declared that the trustees should stand seised for the use of *Frances*, until *Thomas* should recover or die, and, after his decease, she gave the estate to *Frances* for life, remainder to her first and other sons.—She died 1754.—By deed, between *Jeffery* and his wife, 31st March, 1748, reciting that he had laid out the £1,400, and £350 more, he and *Frances* conveyed the lands so purchased to trustees, to the uses in the settlement, *Jeffery* made his will, 3d December, 1761, and directed £350 to be laid out in the purchase of an house, which should be to his wife for life, with remainder among the children.—He gave the wife £700, which he desired she, at her death, would divide among the children. He died in 1764, and on his death the plaintiff, the eldest son of *Jeffery* and *Frances*, became entitled to an estate tail in the premises, subject to the charges. Some other estates came, from other quarters, to *Frances*, during the coverture, and especially a *chose in action*, reduced by the husband into possession. And this bill was filed by the plaintiff, to render all these estates subject to the marriage settlement, contending, that they were bound by the articles, and that the wife had, when adult, done acts in affirmance of the settlement, which however did not appear in evidence.

Mr. Scott, for the plaintiff, cited *Cannet v. Buckle*, 2 P. W. 243.—*Harvey v. Ashley*, 3 Atk. 607.—*Lucy v. Moore*, 3 Bro. P. C. 514 (a), and *Durnford v. Lane*, ante, 106.

(a) Ed. Toml. vol. iv. 343.

Lord

*Lord Chancellor.*—This is a bill filed by *Jeffery Williams*, the eldest son of the marriage, to have three different estates applied to the uses in the marriage articles. A residue of £1,600 or upwards, coming to the mother, an estate for life given to *Frances* by her mother, and another estate which descended upon her in tail. It is impossible to read such a clause as this in a settlement by an infant without observation. It was never heard of, that a husband was permitted to covenant with an accounting party for an indemnity.—It goes to defeat any claim upon her to abide by this settlement, unless some *ulterior* act has been done by her to confirm it. It is contended to be the effect of the settlement, to preclude her from any thing, whether real or personal, which should come from any quarter. To bind an infant, the settlement must be fair and reasonable. The estate of the mother is not bound by the covenant. Has there ever been a case where a contract has been construed to bar an infant from every thing? On what precedent could the Court pronounce it to be right? But I do not think the covenant extends to it, I think *otherwise* relates to the mother only,—if it was to extend further, I should think it unreasonable. Suppose the estate of the mother to be bound, the other estate comes *aliunde*, and is not bound. The estate given to the wife for life by the mother is given to the son in tail,—nothing could be bound but the estate for life, the son takes his estate unfettered, and contests the will as to the life-estate. The case of *Noye v. Mordaunt*, (2 Vern. 581) applies to it. These observations go to dispose of his claims as to the real estates. But the husband having covenanted for himself, that what should come to him should be bound by the articles (which he might do), therefore the *chose in action* must be so applied, and also the moiety of the residuary estate of the mother. The Master must therefore enquire what that was, that it may be laid out in land to the trusts in the settlement. Those trusts cannot be doubted. It has been endeavoured to be argued, that the annuity and portions ought to be increased in proportion to the fund, but the original settlement was made with an expectation of increase, for otherwise the estate must ruin itself. £1,400 to purchase an estate, charged with £40 *per annum*, and £600 to be raised if there was a younger child, without prejudice to the annuity, and which the father might raise by an anticipation,—the estate to be purchased must have been ruined (a).

(a) Vide *Caruthers v. Caruthers*, post, vol. iv. 499, and the note at the conclusion of it.

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S. C.

15. *Serj. Hill's*  
*MSS.* 141.Wife barred, by  
a specific legacy,  
from taking the  
residue.

## MARTIN v. REBOW.

**I**SAAC Martin Rebow Martin, Esq. by his will, dated 22<sup>d</sup> September, 1781, devised to the plaintiff, his wife, a real estate; he also bequeathed to her his house in town, his plate, &c. (but no pecuniary legacy), and made her executrix. The only question was, whether she was entitled to the residue of the personal estate in her own right, or only as a trustee, subject to the statute of distribution.

Mr. *Attorney-General* for the plaintiff.—The general turn of the cases is, that the executrix is to take beneficially, and it has been lamented that the rule was ever infringed upon. The case of *Foster v. Munt*, 1 Vern. 473, which was the first where it was altered, turned upon fraud. But the cases have made distinctions; the Court has decreed that children and heirs at law, made executors, should take beneficially. So too in the case of a wife, 2 P. W. 215. In *Lawson v. Lawson*, in the House of Lords; 7 Bro. P. C. 511 (a); the property specifically given to the wife, being her property before the marriage, was held not to exclude her from the residue.

Mr. *Selwyn* on the same side.—In *Foster v. Munt* it was a pecuniary legacy, and given for care and pains. There has been no case argued since, in which the Court has not expressed some displeasure at the rule. In *Ball v. Smith*, 2 Vern. 675, it was determined that the wife should take both the legacy and the residue.

Lord Chancellor.—That shews the case of *Foster v. Munt*, was considered as establishing a rule out of which they were making an exception. Here it is over and above her dower and thirds, and the house was leasehold.

Mr. *Mansfield*, for defendants.—It is impossible to decree her the residue without altering the established rule from *Foster v. Munt*, to the present time. The rule was established also by Lord *Harcourt* in another case, *Farrington v. Knightly*, 1 P. W. 544. As to its being the case of a wife, and that she has no pecuniary, but a specific legacy—

Lord Chancellor.—The case of a wife may make a circumstance in evidence, though it cannot make a rule of law.

Mr. *Mansfield*.—There is no sensible distinction between a specific and a pecuniary legacy,—the one is just as inconsistent

with the rule as the other. The case in 2 Vern. 675, was plate only, no other legacy, and it was plate which she herself had brought, and some other in lieu of what the husband had sold. In *Southcot v. Watson*, 3 Atk. 226, no such distinction was laid down.

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**Lord Chancellor.**—The rule is too fully established to be shaken from time to time. It is better to let it continue unmoved. If it were a new question it might be argued, but the time is over; the rule is laid down, and has been acted upon for years past, that where the testator gives the executor a legacy, he pays him for his trouble, and turns him, as to the residue, into a trustee. There would be no end to the variety of cases that would arise. An account must be taken, and one-third of the residue go to the wife, the other two to the children (a).

(a) The notion which seems formerly to have been entertained, and which was adopted by the Court in *Bell v. Smith*, cit. sup. & *The Duke of Rutland v. The Duchess of Rutland*, 1 P. W. 215, that where the wife is executrix, she shall have the residue undisposed of, though she has a legacy, is exploded by *Farrington v. Knightly*, cit. sup. and several cases there cited, *Gobeall v. Sounden*, 2 Eq. Ab. 444, and the principal case. The circumstances relied upon by Lord Macclesfield, in the Duke of Rutland's

case, that the executor was the head of the family, who bore the honor, and must be justly thought to be above the drudgery of a bare executor, is also entitled to as little consideration. For the general doctrine upon this subject, vide Mr. Cox's note to *Farrington v. Knightly*, and the case of *Kemp v. Finch*, post, vol. iv. 239, where the subsequent cases upon this point, and also as to the admission of parol evidence to rebut the equity of the next of kin, are collected and arranged.

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## TRINITY TERM.

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22 GEO. III. 1782.

### (d) MORTIMER v. CAPPER.

**THOMAS CAPPER** contracted to sell to the plaintiff *Mortimer* a piece of ground, which had descended upon him *ex parte materna*, for £200 (to pay off a mortgage upon it) and £50 a-year annuity to the vendor for his life. *Thomas Capper* died (being found drowned) two days after the contract was reduced into writing, and the plaintiff now filing his bill for a specific performance against the heirs at law, they, by their answers, insist, that no payment of the annuity having been ever made, the contract

Sale of an estate for a certain sum of money, and an annuity for life. The agreement being fair, a court of equity will decree a specific performance, although the party die before any payment of the annuity.

(d) *Jackson v. Lever*, post, vol. iii. 605.

was

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was void, and the two sets of heirs contend respectively among themselves, that the estate descends, the one to the heir *ex parte paterna*, the other to the heir *ex parte materna*. Jones, who was the agent of Capper, had offered the purchase to several persons before Mortimer, who took it upon Jones's statement of the value, and it was proved to be done with the approbation of Capper's brother and other friends.

Mr. Arden, for the plaintiff, stated the agreement, and insisted, that being a fair transaction at the time, it could not be affected by the subsequent event of Capper's death.

Mr. Hollist on the same side, cited *Baldwin*, administratrix of *Elizabeth Stephens*, against *Boulter*, before Lord Bathurst, 25th November, 1776, to the following effect, (*viz.*) *Elizabeth Stephens*, the plaintiff's testatrix, having received a sum of £150, was desirous of purchasing an annuity for her own life. Upon application to Mr. Baldwin, (the attorney) he calculated the value at about seven years purchase, (supposing her sixty-five years of age) but finding she was seventy, he calculated it at five years purchase, these calculations were shewn to the defendant *Boulter*, a clergyman, and relation of the family, who granted Mrs. Baldwin an annuity at ten years purchase, secured by his and his son's bonds. Mrs. Baldwin died before any payment of the annuity, and Lord Bathurst refused, upon all the circumstances, to set aside the transaction.

Mr. Attorney-General for the heirs at law.—The Court refused to carry the agreements into specific execution, in the *South sea* year, 1 P. W. 570. *Cud v. Rutter*. So in the case of an house \* which was burnt down before the payment of the money. The ground upon which this is argued, that the moment the agreement is executed, it has its full effect, would have applied in the case before Sir Joseph Jekyll, (that in P. W.) *Pope v. Roots* in the House of Lords, 7 Bro. P. C. 184. (a) was a case in point. *Roots* contracted, 16th July, to sell to *Pope*, for an annuity, *Roots* lived to November, but never received any pay-

\* This is not a determined case, but only put by Sir Joseph Jekyll, Master of the Rolls, in giving judgment in *Stent v. Baile*, 2 P. W. 220, the only determined case at all similar, is that of *Cass v. Ruddle*, 2 Vern. 280, where a specific performance was decreed, but that case was said by Lord Chancellor Apsley, in *Pope v. Roots*, to be mis-reported, for it appeared by the printed cases in the House of Lords, that *Cass* made a title in January, 1691, by conveyance executed, and the earthquake did not happen 'till July, 1692, that *Ruddle* by his answer admitted he had the £700 in his hands, and the decree was founded on a good title to the premises having been conveyed to him. See the note in Mr. Raitby's edition.

(a) Ed. Toml. vol. i. 370.

ment,

ment, though by the terms of the contract, the first became due in October, the contract was not impeached, but set aside on that ground only. Here the contract cannot be carried into execution, on account of the death of the party. The only distinction between the cases is, that here *Capper's* mortgage was to be paid by *Mortimer* (a).

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*Lord Chancellor.*—To decree for you, I must lay it down as a rule, that where a bargain depends upon a contingent event, which chance both the parties know, if the event turns out against one of the parties he must be discharged from his contract. There never was a case where an agreement was made more fairly, or more with the approbation of the family. How then is it to be impeached?—that the annuitant died before a payment—that the bargain has turned out all advantageous to one party, which was supposed to be fortuitous.

*Mr. Mansfield*, for the heirs *ex parte materna*.—It is not of course to decree a specific performance of agreements. There is no reason that where an agreement becomes extremely hard, and a man is to convey an estate for almost nothing, it should be carried into execution. *Pope v. Roots* is a weaker case for the defendant than the present. This would not have been carried into execution against *Capper*. It is no doubt a very advantageous agreement for *Mortimer*. The only evidence to support the agreement is, that the witness (*Capper*, the cousin of the deceased) believed the vendor to be competent at the time. He had been twice confined, and his health was extremely impaired. The ground was worth £1,300, and was sold for only £200, and £50 a year, for the life of *Capper*.

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*Lord Chancellor.*—I remember a case of a contract for a piece of ground, which was to be inclosed, for £20, and, upon a bill for specific performance, the defence was, that it was worth £200, and although the contract was to be performed *in futuro*, yet neither party knowing the value, the Master of the Rolls decreed a performance (b).

*Mr. Ainge*, to shew that equity will not decree a performance of unreasonable agreements, cited *Johnson v. Nott*, 1 Vern. 271, *Bromley v. Jefferyes*, Pr. Ch. 138, and that subsequent accidents

(a) The distinction between *Pope v. Roots*, and the present case, and *Jackson v. Lever*, post, vol. iii. 603. is pointed out by Mr. Sugden, Vend. & Purch. 5th edit. 240.; that in the former case a payment of the annuity having become due before the death of the vendor, the

purchaser neglected to make or tender it, and therefore could not insist upon a specific performance. See also the observations of Macdonald, C. B. in *Wyvill v. The Bishop of Exeter*, 1 Price, 295.

(b) See this case cited 6 Ves. 24.

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will sometimes affect agreements, he cited *Savage v. Taylor*, For. 234, and *Pope v. Roots*.

**Lord Chancellor.**—The enquiry should be as to the value of an annuity for the life of *Capper*, in order to introduce the question, whether an estate being disposed of for an annuity, (which is a contingency) the contract shall fall to the ground, if no payment of the annuity shall be made. I think, if the price be fair, the contract ought not to be cut down, merely because the annuity, which is a contingent payment, never became payable. Let it be referred to the Master to enquire into the real value of the estate, and what sum *Thomas Capper* ought to have paid for such an annuity (a).

(a) As to this case and *Jackson v. Lever*, post, vol. iii. 600. see *Sugden's Vend. & Purch.* 5th edit. p. 235. and 238. et seq. *Poole v. Shergold*, post, vol. ii, 118. *Spurrier v. Hancock*, 4 Ves.

667. *Paine v. Mellor*, 6 Ves. 349. *Ex parte Minor*, 11 Ves. 559. *Harford v. Purrier*, 1 Mad. 532. *Akhurst v. Jackson*, 1 Swanst. 85.

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18 Serj. Hill's  
MSS. 70.

Countess Dowager of **PLYMOUTH** and Another v. Lady Dowager  
**ARCHER.**

*Appeal from the ROLLS.*

Devise of lands to be sold, and other lands to be purchased in another county, *A.* to be tenant for life, (*sans waste*) of the lands to be purchased, and the rents and profits of the lands to be sold, to be to the same uses, *A.* cannot cut down timber on the lands to be sold.

**THOMAS** Lord *Archer* devised lands in *Essex* to trustees, to be sold, and the money to be laid out in the purchase of lands in *Warwickshire*, which, when purchased, were to be to the use of *Andrew* Lord *Archer* for life, without impeachment of waste, remainder to Lady *Plymouth* and Lady *Winterton*, testator's daughters, and the heirs of their respective bodies, as tenants in common. The personal estate was limited to the same uses with the real, and the rents and profits of the lands in *Essex* till sold, were to be to the use of the same persons, who would be entitled to the lands in *Warwickshire* when purchased. The estates in *Essex* not being sold, Lord *Archer* cut down timber on that estate, and the question was, whether he was entitled so to do, he being intended by the will to be tenant for life in the lands to be purchased, without impeachment of waste, and the rents and profits of the *Essex* estate being to go to the persons entitled to the estate to be purchased. His Honor, Sir *Thomas Sewell*, decreed, that *Andrew* Lord *Archer* was not entitled to cut timber on the *Essex* estates, and ordered the defendant, his executrix, to account for the timber so cut.

Mr. *Attorney-General*, for the appellant, stated the case, and argued that Lord *Archer* was entitled to every profit in the *Essex* estate



estate that he would in the be *Warwickshire* estate, when purchased, where he would, as tenant for life without impeachment of waste, be entitled to cut timber.

*Lord Chancellor.*—If he can cut the timber on the estate to be sold, and likewise on that to be bought, he will have double waste.

*Mr. Attorney-General.*—He would have a right to open coal mines on the estate to be sold, and likewise on that to be bought.

*Lord Chancellor.*—The quantity of the subject might have some weight on the construction of the words, *rents and profits*, if it was equivocal. I agree the question to be, what the trustees should do acting correctly and properly. They were to purchase lands to settle on *Andrew Lord Archer*, in such way as to give him the property in the timber. The question is, whether the interest was to be the same in that to be sold, as in that to be purchased. The estate was given to the trustees absolutely to sell, and to lay out the money in lands to be settled on *Andrew* for life, without impeachment of waste. The testator seeing that profits would arise before the sale, says, they shall belong to the persons entitled to the estates to be bought. *Rents and profits* in general mean annual profits. It is true, they may so stand as to mean more; if there be enough in the will they must do so here,—but, unless there are some extraordinary words, they must mean annual profits (a). The only argument for the power is, that he would have it in the estates to be purchased. I cannot get over the objection that it will give him double waste: that would be too much. Timber is part of the inheritance, and cannot go to the tenant for life, but by express words. I think the tenant for life could not open a mine. If it is already open, the working it is part of the annual profits, the minerals are not then held part of the inheritance.

*Decree affirmed (b).*

(a) See a very full and elaborate note of Mr. Vesey's to the case of *Lord Albermarle v. Rogers*, 2 Ves. jun. 481, where all the prior cases are cited; also the observations of Lord Thurlow (1 Ves. jun. 234) upon the rehearing of the cause of *The Countess of Shrewsbury v. The Earl of Shrewsbury*, post, vol. iii. 120. In the late case of *Allan v. Backhouse*, 1 Ves. & Bea. 65, most of the cases are cited and commented upon, and the rule, as stated by Mr. Cox, in his note to *Trafford v. Ashton*,

1 P. W. 419, recognized, viz. that the natural meaning of the word "profits" is "annual profits," and that the cases which have extended it further are exceptions out of the general rule in which the context has afforded a different construction; and see Lord Eldon's observations in *Boote v. Bhandell*, 1 Meriv. 233.

(b) See Lord Eldon's observations upon this case in *Burges v. Lamb*, 16 Ves. 180.

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18 Serj. Hill's  
MSS. 75.

A trader advanced half the money for the renewal of a lease, the lessee giving a note to repay the money, unless she should by will give the estate to one of his children. She bequeathed the estate to his daughter, and the father becoming a bankrupt, [ 161 ] a moiety of the estate vested in the assignee, under 1 Jac. 1. c. 15.

## FRYER v. FLOOD.

**ELIZABETH PEARCE**, being about to renew a lease of an estate in *Devonshire*, at the expence of a fine of £160, borrowed of *Flood* £80 (of which *Flood* himself borrowed £50) and gave a promissory note to repay the money, unless she should bequeath the estate to some one of his children. She afterwards devised the estate to the defendant *Flood's* daughter; but, before the decease of *Mrs. Pearce*, *Flood* had become a bankrupt. His assignees filed this bill against the defendant, the daughter, and the representative of *Mr. Pearce* claiming the £80, or half of the estate, as being purchased by the bankrupt, in the name of a child, under 1 Jac. 1. c. 15. and, upon a hearing before his Honor, obtained a decree, from which this was an appeal.

*Mr. Attorney-General*, in support of the decree.— Under 1 Jac. 1. c. 15. this estate ought not to be enjoyed under a volunteer; the interest in the lease being for the bankrupt's child. If *Mrs. Pearce* had paid back the money, it would have gone to the assignees, ought the will of a third person to affect the assets of the bankrupt? The case of *Lilly v. Osborne*, 3 P. W. 298, was determined on the ground, that the party was not a trader at the time of the purchase, and was in solvent circumstances; but here he was a trader, and therefore it was within the statute, *Walker v. Burrows*, 1 Atk. 93.

*Mr. Hollist*, on the same side, cited *Crisp v. Pratt* (a), 7 Vi. 97. pl. 2. *Tucker v. Cash*, Sty. 288.

*Mr. Mansfield*, for the appellant.— *Flood* was at the time supposed to be in very good circumstances. The statute was intended to prevent bankrupts from conveying their estates to their children. The bankrupt could not have obtained the estate to himself. Can the bankrupt's child, becoming entitled by the bounty of another, be within the statute, any more than if she had purchased the child a trade, or a pair of colours?

*Mr. Ainge*, the same side.— The bankruptcy was eight years after the purchase, five years will purge an act of bankruptcy. And it is not stated that he was at the time a trader. Now that *Mrs. Pearce* has performed her part of the contract, they call on her representative to refund the money, when they cannot take back the estate, which is gone to the bankrupt's family.

*Lord Chancellor*.— This is a hard case, and I should be glad, but I do not see how, to take it out of the principle of the statute.

(a) Cro. Car. 548.

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It is very clear, that one of the cases to be remedied by the statute, is that of a father buying an estate, from a stranger, to be conveyed to his child. Then if the case was so varied as to make him a trustee (suppose for a moiety) for the child, that would go to the assignees. In the present case, the aunt would not perhaps have given it to the child, but for the agreement with the trading father. If it was money advanced without a lien, it might be dangerous to give it to the assignees, but, as far as the money advanced is a lien, the father procured an interest, which must go the assignees (a).

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*The Decree must be affirmed.*

(a) Vide Co. B. L. 302. et seq. *Ex parte Shorland*, 7 Ves. 88, and *Glaister v. Hewer*, 8 Ves. 195, 9 Ves. 12, 11 Ves. 377, which was a purchase in the joint names of the bankrupt and his wife; and where it was held, that if the purchase

was made with the wife's money, if previously received, and disposable by him as his own, not bound by any agreement with a trustee, and the receipt, not connected with the purchase, it would be within the statute.

HENRY BARNEY MAYHEW, and MARY his Wife,  
Administratrix of JAMES, CATHERINE, and  
EDWARD NANFAN, and also Representative of  
MARIA and THOMAS NANFAN, - - -

Plaintiffs.

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18 Serj. Hill's  
MSS. 76. 80.

JOSEPH MIDDLEDITCH, LEWIS WILLIAM BUCK-  
BRIDGE, and HESTER his Wife (who, with MID-  
DLEDITCH, were surviving Executors of JOHN  
NANFAN) JOHN HOOPER, personal Representa-  
tive of ELIZABETH NANFAN, and JAMES NAN-  
FAN, Representative of DOROTHY NANFAN,

Defendants.

UPON the marriage, in 1703, of *George Nanfan* and *Maria*, only child of *Dorothy Prior*, lands (being the property of *Dorothy* the mother) were settled on the mother *Dorothy* for life, remainder to *Maria* for life, remainder to trustees for a term of six hundred years, remainder to first and other sons, with remainders over. The trusts of the term were to raise £1,500 for such younger children of the marriage, at such times, and in such shares, as the father and mother should by joint deed appoint, and, in default of appointment, for all the children who should be living at the death of *Maria*, share and share alike. In 1724, there being then several children of the marriage, (viz.) *George*, *Thomas*, *John*, *James*, *Maria*, *Dorothy*, and *Catherine*, of whom one, *Dorothy*, had married against the parents consent, the father and mother by deed directed the sum to be raised for the use of all the children then born, or to be born, share and share alike, except *Dorothy*, to whom, on account of her disobedience, they gave sixpence only: with a power

By marriage settlement, £1,500 was provided for younger children, in such shares as the parents should appoint; in default of appointment, to all the children after the death of the wife. The parents afterwards made an appointment excluding one child; this deed vests the portions in the children born or to be born,

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power of revocation. After the deed of appointment, two other children, *Edmund* and *Elizabeth*, were born. All the children, except *John*, died in the life-time of the mother, (who survived the marriage seventy years, and her husband forty,) some having attained their ages of twenty-one years. On the death of the mother, in 1773, this question arose between the plaintiffs, (the representatives of some of the children who died in the life-time of the mother) claiming their respective shares of the £1,500, and the defendants claiming under *John*, the surviving son, and other of the deceased children; the question being whether the portions vested by the deed of 1724, or at the death of the mother, when the term came into possession.

Mr. *Attorney-General* and Mr. *Stainsby*, for the plaintiffs.—The Court leans to vest portions, when they become necessary. If the children should all die before the appointment, the term was then to sink, therefore, if the appointment was made, the term was then to be an absolute and indefeasible term. The appointment to all the children, made a tenancy in common. It was only intended that the mother should take the rents for her life. There being no time stipulated for the payment, it vested immediately. *Lord Rivers v. Lord Derby*, 2 Vern. 72, takes up the case of *Paulet v. Paulet*. As to excluding a child who might become an eldest son: if the child had become so, it would have operated only as appointing him tenant in tail, and in expectancy on the death of the mother. The power of revocation does not suspend the effect: but it may be a question whether the father and mother had any right to interpose the power of revocation (a). Whether there was or not, it was never executed. They cited *Menzey v. Walker*, For. 72, (against the exclusion of *Dorothy*). *Watpole v. Colville*, by Lord *Hardwicke*, Barnard. 153. *Lloyd v. Biscoe*, at the Rolls, 1758, *Cholmondeley v. Meyrick* (b), (cited and stated ante, p. 77,) where the doctrine of vesting is very fully taken up. *Teynham v. Webb*, 2 Ves. 198. *King v. Withers*, 3 P. W. 414, and For. 117. *Tournay v. Tournay*, Pr. Ch. 290.

Mr. *Madocks*, for the representative of one who attained twenty-one, and married.—If the portion did not vest at the execution of the deed, it did at twenty-one, or marriage, when the child would want it.

Mr. *Ambler* for the defendants.—Wherever there is an appointment, it must operate according to the deed appointing. If the children here had lived till they wanted the portions, they would have been vested interests. This appointment might have been by will.—Nothing therefore could vest 'till the death of the wife.

(a) 1 Wils. 224.

(b) 1 Eden, 77.

*Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. *Bruen v. Bruen*, 2 Vern. 439. *Stevens v. Dethick*, 3 Atk. 39.

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Mr. Selwyn on the same side.—If the £1,500 did not vest till the death of the mother, John was then the only survivor. Under the original settlement, it was to go to such children as the father and mother should appoint. If no appointment, or an imperfect one, to the children who should be living at the death of the mother. It only remains to see the effect of the appointment, that was merely to exclude *Dorothy*. It only meant to provide what the shares should be, and therefore appointed to all the children except *Dorothy*. It does not affect the time when the shares should be paid.

Mr. Attorney-General in reply.—The appointment expressly declares the money shall be raised. The argument *ab inconvenienti* applies strongly, for it must be exceedingly inconvenient if these shares were not to be vested interests.

Lord Chancellor.—It seems exceedingly clear, that if the whole had been at first part of the power, and the husband and wife had ordered it to be paid at a day certain, the money must have borne interest from that day, by anticipation of the term. It would then also be clear that it would have been vested in those children, from the time when the instrument was made. The difficulty is not so much upon the first branch of the question, as upon the intent of the whole. The object in the contemplation of the settlement, was to raise it after the wife's death, and, if it stood on the last branch on the question only, it must be raised for the only survivor. The intention was to give the parents a power to anticipate the charge; then the question is, whether they intended to anticipate it. I think they did not; for they have named no time of payment, and have said nothing about executors, &c.—they have only expressed an intention to exclude *Dorothy*. The original deed was, that it should not be raised and paid at such time as they should think fit.—They have only said to which children it should be paid, without anticipating the payment. Upon the whole, I think it was not vested. However, upon the whole I rather think the plaintiffs are entitled.

His Lordship therefore decreed an account of the several shares, and that they should be paid to the representatives of the respective children, and the costs to be paid out of the fund.

A day or two after, his Lordship expressed himself to be, upon the whole, dissatisfied, and ordered the cause to be reheard. At the time of the rehearing the Reporter was absent, but he has been favoured with the following note of the Lord Chancellor's judgment.

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*Lord Chancellor.*—Arguments of inconvenience have gone a great way as to general rules of law.—When a construction is doubtful, an argument of inconvenience may be used to explain the doubt. A great part of the argument, in this case, has gone upon the times when portions to be raised out of lands should vest: but the cases, upon this subject, are quite out of the question—they go upon the intention of parties, which is out of the case before us, for two reasons; first, because the case is not stated to be the case of children not living to the time when a portion is necessary; secondly, because the circumstances of the case go a great way to exclude it. The money was to be raised if there was any child. The case must be taken as of children who died before the mother, but lived to want portions, and of one child who survived the mother. The question is, whether the children are to take under this appointment, or as if no appointment had been made. The instrument by which the portions are given, supposes an appointment may have arrested the effect of the clause, directing the ceasing of the term. The general intent was to give the parents an opportunity of providing for children, according to their discretion, to the amount of £1,500. If the parents have not exercised that discretion, then the £1,500 is only to go to children surviving the mother. But this is not the case that has happened. It has been disputed whether the parents have expressed the period when the portions were to vest:—I think they have not:—The payment was not to be sooner than in the original instrument. But they have made a designation of the persons in whom the money was to vest, which is perfectly repugnant to the former instrument (a). The appointment has given the money to all the children of the marriage. The point is not brought before the Court, whether they died before twenty-one, or marriage, or as not to want the portion. It is clear all the children were designed, according to the appointment. As to the time of vesting; according to the instrument, without any time named, they must vest immediately. This differs from all the cases, for this is a case where, after marriage, and upon a view of an existing family, the parents have given portions to persons described.—First, as to those born at the time of the appointment, suppose one had died under twenty-one, could it be contended, that the representative of the child would not be entitled? The effect of this is to put the children after born, in the same predicament. The money is to be equally divided between them. They are, therefore, tenants in common, and, whenever a share vests, it is transmissible, with-

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(a) That is, to the settlement, if there had been no appointment, for the appointment is to all, but the settle-

ment, if no appointment, is to those only who should survive the mother. (Serj. Hill).

out



out survivorship. The designation of the persons to take, is altered by the appointment. Not those alive at the death of the mother only, but all the children must take (a).

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v.

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*Decree affirmed.*

(a) Qn. why the appointment was not void. (Serjt. Hill). As to illusory appointments, vide *Packlington v. Bayne*, post, 450.

## CHAMBERLYNE v. DUMMER.

S. C.  
2 Dick. 600.

**THOMAS DUMMER**, Esq. made his will, by which he devised his freehold and copyhold estates at *Cranbury*, in the county of *Hants*, and elsewhere, to the defendant, *Harriot Dummer*, his wife, for and during her natural life, remainder to *Charlotte Holland*, (an elderly lady) for life, remainder to the plaintiff, in fee. This will was made a considerable time before his death; but, about a fortnight before his decease, he made two codicils to his will, one of which only was now in question. A clause of this codicil was to this effect: "Whereas, by my will, my wife cannot cut any timber, now my will and mind is, that she may during so long time as she shall continue my widow, cut timber for her own use and benefit, at seasonable times in the year." Mrs. *Dummer*, under the power given by this codicil, made contracts for, and began to fell timber. The plaintiff filed his bill, and applied to his Honor the Master of the Rolls, for an injunction to stay the cutting of ornamental timber, or such as served for shelter to any of the mansion houses, and also of young wood not come to maturity. His Honor, *ex parte*, and unattended by counsel, made an order in *Hil. Vacation*, 1782, to stay the cutting of any timber whatsoever, until answer and further order. And 18th April, 1782, Mr. *Arden* and Mr. Serjeant *Rooke*, moved to discharge his Honor's order, as going farther than the plaintiff's application, and preventing her cutting what she was undoubtedly entitled, under the will, to cut.—The order was supported by Mr. *Attorney-General*, Mr. *Mansfield*, and Mr. *Hollist*.—Mr. *Attorney-General* contended, that Mrs. *Dum-*

*T. D.* provided, by a codicil to his will, that his wife (whom he had made tenant for life) might cut timber "for her own use and benefit, at seasonable times," what timber the tenant for life shall be restrained from cutting (a).

(a) The codicil was in these words: "Whereas in and by my last will and testament, I have devised my estates so and in such manner, as that while my dear wife *Harriot Dummer*, shall be in possession thereof, she will have no power to cut timber: Now I do hereby give and grant unto my said dear wife for and during so long time

as she shall live and continue my widow, full power and authority to cut timber upon any part of my estates for her own use and benefit, at all seasonable times of the year; any thing in my said will to the contrary notwithstanding." Reg. Lib. as referred to, post, vol. iii. 549.

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nier, being by this codicil made tenant for life without impeachment of waste, could not cut down ornamental timber, such as protected buildings, or such as by standing longer would pay good interest for so doing. Mr. *Mansfield* objected that several of the trees marked, if cut down, would expose the young saplings to the cold winds. Mr. *Hollist*, that she should cut only what was fully mature, and would suffer by standing, and that nothing was timber under five solid feet; he also contended that under the devise she could not cut for sale, but for *her own use* upon the estate. Lord Chancellor utterly rejected the idea, that she was to cut *for her own use* on the estate, or for *estovers* only, and thought that she was entitled not merely to cut timber which would suffer by standing, but every thing which could fairly be called *timber*, although she should not cut such sticks as would only make paling, &c. he recommended to the parties to accommodate what should be cut under this idea, being willing to save to the defendant the season for cutting timber; but, if they could not settle the matter, said he must be attended with affidavits to settle the terms of the injunction. Mrs. *Dummer* afterwards put in her answer, and admitted cutting trees in the lawns and pleasure grounds at *Cranbury*, but alledged that it was for the purpose of widening the way to the house, to prevent damps, and improve the place. She admitted also, the cutting trees placed in rows at *Woolston* and *Badsley*, but that they were such as she did not consider as ornamental; she alledged, that the oak trees of six inches girth, and sixteen feet in length, or containing four feet of solid measure, were deemed timber trees, and that she had cut down none so small; that ash of five inches girth, and elm of seven, were also esteemed timber, and that she had cut none under those sizes. Upon motion to discharge the order for the injunction, 19th June, 1782, Lord Chancellor was of opinion, upon consideration of the case, and of the authorities cited, viz. *Packington v. Packington*, 3 Atk. 215.—*Aston v. Aston*, 1 Ves. 264.—\* *Leighton v. Leighton*, 22d March, 1747-8. † *Obrien v. Obrien*, 20th May, 1751, and *Lord Castlemain v. Lord Craven*, 7th Decem-

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\* *Leighton v. Leighton* was a bill by the eldest son, tenant in tail, expectant on the death of the father tenant for life, to restrain him from committing waste, by cutting down timber, especially such as was ornamental to the house. The Court, upon affidavit, and certificate of the bill filed, granted an injunction to restrain the defendant from committing waste upon such part of the estate, whereof he was subject to impeachment of waste, and as to the mansion-house, out-houses, gardens and orchards, timber growing for ornament and shelter to the house, to restrain him from committing waste therein 'till answer or further order.

† *Obrien v. Obrien*: Injunction to restrain defendants from cutting down any timber trees or other trees growing on the estates, which were planted or growing there for ornament or shelter of the mansion-house, or that grew in vistas, planted walks, or lines, for the ornament of the park part of the estate, and also from cutting down any saplings growing on any part of the estates not proper to be felled, 'till answer or further order.

ber,

*her*, 1733, 2 Eq. Ab. 758. 22 Vin. 523. that the injunction should issue nearly in the terms of that of *Obrien v. Obrien*, viz. defendant to be restrained from cutting trees which were saplings, and not proper to be cut as timber\*. (a)

\* See in addition to the cases cited, *Perrott v. Perrott*, 3 Atk. 95.—1 Ves. 521. *Earl Bathurst v. Burden*, post, vol. ii. p. 64.

(a) For the cases upon the subject of equitable waste, vide post, vol. iii. 549, the note to this case, when it came on upon the hearing.

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TAYLOR v. POPHAM, *et c contra*.

Lincoln's Inn  
Hall, July 16,  
1782.

THE late *Peter Taylor*, in his life-time, granted to his son *Paris Taylor*, two annuities of £100 and £200 *per annum*, and, there being accounts subsisting between them respecting different commissaryships in *Germany*, where *Paris* was deputy paymaster to *Peter*, *Peter Taylor*, by his will, 1st Sept. 1775, *int. al.* gave to *Paris* £600 *per annum*, on condition that he should within three months execute a release of all demands on his estates, being assured there was nothing due to him on the accounts. He died October 1777. *Charles William Taylor* and *Frances Jane Taylor*, other children of *Peter*, who were beneficially entitled under his will, Hil. 1778, filed a bill against *Paris*, who claimed £23,317, as due to him from *Peter's* estate, that he should release: stating that a release had been tendered and refused, and, therefore, insisting that he should be considered as having broken the condition on which he was to have the £600 *per annum*. *Paris Taylor* filed his bill, insisting on his demands upon his father's estate, and that he might release when *L.* would, having an option so to do or not, upon the close of the accounts. The cause and cross-cause stood this day for judgment, 13th Aug. 1781.

*P. T.* in his life-time granted two annuities to *P. T.* his son, and, there being subsisting accounts between them, by will gave him an annuity of £600, on condition he should, within three months, execute a release of all demands on his estate, the release tendered including the two annuities granted during the life; *P. T.* the son did not forfeit his annuity of £600, by refusing to execute it, but a release settled by the Master (omitting those annuities) being tendered and refused. *Lord Chancellor* held, he forfeited the annuity under the will.

*Lord Chancellor*.—I am of opinion it was the true meaning of *Peter*, to prevent the account *Paris* sought by his bill, and, therefore, I cannot order such account, or furnish him, by means of this Court, with any intelligence of his father's affairs. This, therefore, excludes every idea of the testator, that he should have an election. The next question is, whether the bill so filed has forfeited the £600 *per annum*, and that leads to a common rule of the Court, as to conditions precedent. If the Court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach (a). The release tendered went

(a) Vide *Northcote v. Duke*, 2 Eden, 322, and the note to it. S. C. Amb. 511. also *Hill v. Barclay*, 16 Ves. 402, and 18 Ves. 56. *Bracebridge v. Buckley*, 2 Price, 280. *Relfe v. Harris*, cit. ib. 206.

*n. Reynolds v. Pitt*, cit. ib. 212. n. S. C. 19 Ves. 134. *White v. Warner*, 2 Meriv. 459, which have over-ruled *Sanders v. Pept*, 12 Ves. 282.

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to the £100 and £200 granted before, (*that Paris* had a right to refuse) or any other claims under the will: I think his litigating it, did not forfeit the £600 annuity. In order to do justice, I must do no more than declare the will duly proved, and refer it to the Master to prepare a proper release, declaring the intent to be to prevent a contest, but that the will did not bar the annuities granted in the life-time, or any claims of *Paris*, except as to the mutual dealings and transactions in the negotiation of money.

*Costs and further directions reserved.*

The cause came on again for further directions on the Master's report, 16th *July*, 1782, when *Lord Chancellor* declared that *Paris Taylor*, having refused to execute the release tendered to him, as settled by the Master, he was not entitled to the annuity of £600, and ordered an account to be taken of all dealings and transactions between the said testator, and *Paris Taylor*, and reserved further directions (a). (b)

(a) N. B. supposing *Paris* had an election, yet this refusal so long after the death of his father, and after the first hearing of the cause, might very properly have been considered as an

election, (*Serj. Hill.*) As to this, vide *Butricke v. Brodkurst*, post, vol. iii. 88.

(b) See a point in this same cause, 13 *Ves.* 59, and 15 *Ves.* 72.

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## MICHAELMAS TERM.

23 GEO. III. 1782.

EDWARD Lord THURLOW, Lord High Chancellor.

Sir THOMAS SEWELL, Knight, Master of the Rolls.

LLOYD KENYON, Esq. Attorney-General.

RICHARD PEPPER ARDEN, Esq. Solicitor-General.

## The ATTORNEY-GENERAL v. HIRD.

*Appeal from the ROLLS.*

Devise of personalty to B. and the lawful heirs of his body, if he should have any, but if he should die without lawful heirs, £1,000 to Lady S. and £500 to C. the contingencies too remote.

**I**NFORMATION at the relation of the governors of the charity for widows and children of clergymen, for charitable legacies against defendant, the executor of *George Bruce*. *Christian Bruce* by her will, dated 8th *January*, 1772, gave "to her brother *George Bruce*, and the lawful heirs of his body, if he should have any, her whole fortune (except a few legacies), but if he should die without lawful heirs, she gave to Lady *Stair* £1,000, and to *James Crawford* £500, the residue to her brother." The property was personal to the amount of about £5,000. The testatrix

testatrix died, and the brother surviving; and having no child, made his will, dated *January 1780*, by which he gave a like legacy of £1,000 to *Lady Stair*, to her sole and separate use, and also £500 to the said *James Crawford*, and made *Hird* executor. He died in *July 1780*. Two questions arose, First, Whether the legacies of £1,000 and £500 under *Christian's* will, in case the brother should die without lawful heirs, were too remote. Secondly, Suppose them not so, whether the same being legacies given by the brother was not a satisfaction for the legacies under the sister's will. His Honor decreed that the legacies, as given by the sister's will, were too remote, and that, if not so, the legacies given by the brother were a satisfaction for the former legacies.

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Upon an appeal to *Lord Chancellor* :

*Mr. Madocks*, for the appellants.—The question as to the remoteness of these two legacies under the will of *Christian*, depends upon two circumstances ; 1st, The intention of the testatrix : and 2dly, Whether they are within the rule of law. If she intended the legacies over, to be after a general failure of issue, then they would be void : if she meant a failure at a particular time, they may be good. The words must receive a construction from the intent of the testatrix, expressed in other parts of the will. The circumstances shew that she meant a failure at the death of the brother ; by the words, “ in case he shall die without lawful heirs.” There is no doubt the words may receive a limitation from the circumstances of the case, *Lamb v. Archer*, 1 Salk. 225. (8 Vin. 100. pl. 41.) *Beauclerk v. Dormer*, 2 Atk. 308. *Keily v. Fowler*, 6 Bro. P. C. 309 (a). *George Bruce*, by his will in 1780, gave the same legacies, together with other legacies, to charities. If he had intended them as a satisfaction, he would have said so ; there is no presumption from the similarity of the sum. There is a circumstance in *Lady Stair's* legacy that has weight, the second legacy is for her separate use, the first legacy would go to *Lord Stair*.

*Mr. Macdonald*, on the same side.—She meant to give her brother the whole beneficial interest during his life, and that if he should have children, which would appear at his death, then that they should have it ; if not, that £1,500 of it should go away, but the rest be at his disposal. Here are controlling circumstances to tie it up to the time of his death. His lawful heirs, *if he shall have any*, shews it was in her idea that he might not. *If he should die without lawful heirs*, these words standing by themselves, would mean generally, but coupled as they are, shew she had the

(a) Edit. Toml. vol. iii. 299. See also the very able opinion of Mr. Justice

Wilkes, delivered in the House of Lords, Wilk. Op. and Judg. 265.

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alternative in her mind, which is called a contingency, with a double aspect. If any circumstance will admit the construction to be agreeable to the intent, the Court will give the words that construction.—*Pinbury v. Elkin*, 1 P. W. 563. In *Keily v. Fowler*, the only circumstance was the return,—the circumstances here are full as strong, for here the residue is given to the brother, so as he shall personally dispose of it. *Forth v. Chapman*, 1 P. W. 663, was construed a contingent dying without issue, as to the personality, though a general dying without issue, as to the real. 2dly. The legacies given by the will of *George Bruce*, are not a satisfaction for those given by *Christian*. It is held, with respect to satisfactions, that an identical sum owed and bequeathed, shall be held a satisfaction, but if there be any circumstance which shews an intention to give a bounty, the Court will restore the words to their natural sense. In *Clark v. Sewel*, 3 Atk. 96, the legacy being to be paid a month after the decease, was taken as a distinction.

Mr. *Graham*, on the same side, cited 1 P. W. 666, for the sake of Lord *Parker's* expression, also *Atkinson v. Hutchinson*, 9 P. W. 258. To the second question, he said—this was from different funds; the first, legacies from the sister's, the second from *George's* own.

Mr. *Attorney-General*, on the other side.—The construction contended for, would remove the land marks of property; the rule of law is, that such a bequest to one, with a general limitation over afterwards to the heirs of the body, is void. *Keily v. Fowler* went to the extreme, and was on the ground of words in the will, and the nature of the property, which was specific personal property,—but here it is not *living at the time of his death, or in the life of any particular person, or at a certain number of years*. The party has mistaken the legal limits, and therefore the intention must be frustrated rather than overthrow the rule of law.—*Butterfield v. Butterfield*, 1 Ves. 133. 154.

Lord *Chancellor*.—The legacies were payable by the executor immediately,—he has made them payable in six months.

Mr. *Selwyn*.—The construction must be the same as if she had said, if my brother shall die without issue, and the words if he shall have any, were left out, for they are only *expressio eorum quæ tacite iussunt*.

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Mr. *Madocks*, replied.

Lord *Chancellor*.—Mr. *Macdonald* argued that the devise was absolute if the brother had no children, qualified if he had, I should

should think if it came to that, his Honor's decree must be wrong. The question is, whether there be any thing in the limitation to controul the general gift, *if he shall die without issue*, or if there be an executory devise, *if he shall have no issue*. I believe she meant, if there was issue who should die, that it should go over. The hardship of the construction is, that the words are carried back to the sense they bear as to real property, and then applied in the same sense to personal. It would be hard in this case, if she meant that if he should die without issue, *living at his death*, the words should be construed as if applied to real estate. I am sorry the judges have thought themselves bound to construe wills contrary to their own opinion of the intent. The words, if construed here otherwise than they have usually been, would overturn the rules of construction, though not the rules of law. If they have been always held to mean a distant dying without issue, and it should be now held otherwise, it will shake the rule of property, therefore I think the Master of the Rolls' decree right. I remember no case where these words have been thought to be a contingent, not an absolute estate-tail. If I think of nothing further, I must affirm his Honor's decree (a).

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*Decree affirmed.*

(a) Vide *Bigge v. Bensley*, post, 187, and the cases cited in the note to it.

*Ex parte* HARRISON.

**T**HIS was a petition for a new trial upon an issue, to try the question whether the petitioner was, or was not, a bankrupt. At the trial it was proved that the petitioner, who was a farmer, renting a farm of upwards of £100 a year, made bricks of earth, taken off the waste without any licence from the lord, (to whom he afterwards paid a consideration) that he had used a kiln, not built by himself, for that purpose, and had, at various times, made from 40,000 to 70,000 bricks every year, and sold different quantities, sometimes only to certain persons, and sometimes generally to all who came for them. It was further in evidence that the kiln was a small one, not fit for burning more than 7,000 bricks at a time. One of the witnesses swore, he was employed by the plaintiff to make the bricks at a certain price, and that he sold them at an advanced value. A commission was taken out 26th May, 1781, and he was found a bankrupt. Upon a petition to supersede the commission, an issue was directed and tried at the assizes at *Debby*, when the counsel for the plaintiff at law cited 2 Wils. 169, which case was not denied to be law by the counsel for the defendant, but they insisted that the bankrupt was only a farmer, and did not

S. C.  
18 Serj. Hill's  
MSS. 29.

A brick-maker taking the earth off the waste, for which he afterwards paid a consideration, and selling the bricks, is a trader within the bankrupt laws.

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not make bricks for sale, but for his own use only.—Mr. Justice *Buller*, who tried the cause, told the jury the question was, whether the bankrupt kept a public sale-kiln; if he did, it was a trading within the bankrupt laws, but if it was a mere private kiln for his own use, and that having too many, he had only sold to a neighbour, that would not be such a trading. The jury found that it was a public sale-kiln, and consequently gave a verdict for the plaintiff's assignees. The defendant petitioned for a new trial.

Mr. Serjeant *Hill* for the plaintiff.—The opinion of the Courts respecting farmers and innholders, dealing much more largely than this man did, has been, that they were not within the statutes. No person is within the statutes, 13 *Eliz. c. 7.*—1 *Jac. 1. c. 15.*—21 *Jac. 1. c. 19.* unless he uses merchandize, or seeks his living by buying and selling. The petitioner is not within either branch of the definition. He is no more a trader, than the lessee of a coal mine, or an alum work. This was a selling only in small quantities; the first building of the kiln was in order to perform a contract with his tenant: but not done for a livelihood, or by way of making a profit.—His principal business was that of a farmer, he had no intention of seeking a livelihood by the brick-kiln, which was a very small one.—The large kilns for trading, (it was in evidence) would burn 13 or 14,000; this would never burn more than 7,000.—No man can be a bankrupt by selling only without buying, on this ground it is, that innkeepers and farmers are not within the bankrupt acts, for though an innholder buys, it is not his proper trade, *Cro. Car. 548.* The case of a brick-maker is stronger, he only sells bricks, he does not buy them. It does not appear that this man bought any thing. He only paid a consideration to the lord of the manor. If a man makes bricks upon his own estate, or on that which he rents, or, as in this case, where the trespass is purged by the consideration, it will not amount to a trading, to make him liable to bankruptcy. In *Cro. Car. 548*, *Berkley* held that an innholder was liable, because he bought and sold for the use of his customers, and their horses; but the other three judges were of a different opinion. Here he could not mean to get a living. 1 *Com. Dig. 522*, refers to *Cro. Car. 549.*—2 *Bla. Com. 474. 476.* From the nature of this dealing, he did not buy, therefore was not within the statutes any more than the lessee of a colliery, or of an alum work. That a person generally called a brick-maker, may be a bankrupt, I do not controvert, because they generally buy bricks, but here it is otherwise.

Lord Chancellor.—*Beet*, one of the witnesses, said he supplied the loam and sand, at 10s. 6d. for those for *Harrison's* own use, and 12s. for those for sale, and which *Harrison* sold at 14s. per 1,000, and that he made 70,000 at that price,

Serjeant



Serjeant *Hill*,—in 2 Wils. 169, the Court, without going into the case of a brick-maker, only took a distinction. The earth being manufactured, would be a reason to make it a stronger case than those stated, and would bring it within the reason of the innkeeper and farmer's cases, where they are not bankrupts, because they add to what they buy.—It is not merely a buying and selling, but a superaddition, which is different from *Dally v. Smith*, 4 Burr. 2148.—Here is only a mixture, and a very small one, of buying and selling. If he had dealt in a very small way, not seeking his living by it, it would not be sufficient to bring him within the acts. *Mayo v. Archer*, Str. 513, shews the proportions to be material.

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Lord Chancellor.—Suppose an innkeeper was to lay in a stock, where every body might be supplied as from any other shop, would not that bring him within the statutes, although the quantity he sold was small, if the demand was no more?

Mr. Madocks cited *Crisp v. Pratt*, Mar. 34. A farmer buying underwood for sale, is not liable to bankruptcy.

Mr. Attorney-General for the assignees.—I admit it to be necessary that there should be a buying and selling. If a man was to get the clay first, and sell it to the bankrupt, or the bankrupt was to agree with the lord of the manor, to get it at a certain price, either of these would be a buying. If there is no buying here, there are many cases where there could be no commission, about which there has never been a doubt. Such as a pottery, pipe clay making. Mr. *Wedgwood*, if his works had not succeeded, might undoubtedly have been a bankrupt. A sugar baker would, though he should purchase the whole of a plantation. So maltsters, paper makers, distillers. The nature of the trade therefore is sufficient. The price given will not be material, for if a person gave him the soil, that would be sufficient. Then, as to the extent. The extent to which it is carried on, is matter peculiarly fit for a jury. If he made for his own use, and casually having too many, sold the overplus, I should have thought it not within the bankrupt laws. But the jury here have found that it was a public sale kiln. The party to be a bankrupt, ought to sell in order to gain, but need not actually gain a livelihood by the trade. If to his character of a farmer, he added another within the bankrupt laws, he certainly might make himself liable to bankruptcy. The place being kept as a sale kiln constitutes the person a trader. If a man obtains a chattel interest in the land and *meliorates* it, that will make him liable to a bankruptcy, as laid down by *Holt*, in *Skin*. 292.

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Lord Chancellor.—I take the gift of the case to be whether a man making bricks out of his own soil, would be within the statutes of bankrupts. If he bought of another and sold, then that would be

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be within the case of a baker, and a great many other cases. The pipe maker was owner of the soil, and yet I think was held to be a bankrupt, though it was doubtful formerly whether a man who bought the material, and converted it into another form, as the distiller does, was liable. It seems to me that the converting coals into another form is not sufficient to make a man liable.

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Mr. *Balguy*, on the same side, cited *Watkins v. Caddel*, B. R. 14th Dec. 19 Geo. 3. on the trade of an iron-master, where Lord *Mansfield* said, that the owner of the land, merely preparing the produce for market, is not a trader, as in the case of an alum work \*; but where the foundation of the estate was made the basis of a manufacture, as in the case of a brick-maker, that would make a man a trader, and cited two cases on the home circuit, of brick-makers being found bankrupts. The extent of the trading is not material, *Priest v. Pidgeon*, B. R. 12 Geo. 3. 1772, a victualler sold out of his house by retail, two gallons of brandy, and five dozen of wine, the jury found him a bankrupt, and the Court refused a new trial; the Court saying this was a proper subject for the jury to determine. *Willet* and another, assignees of *Aaron*, a bankrupt, against *Edmonds*, East. 13 Geo. 3. 1773, an innkeeper in *Cambridge*, used to sell liquors by dozens, out in the neighbourhood, to the distance of three miles, Lord *Mansfield* thought it matter to leave to the jury, whether he was or was not a bankrupt †.

*Lord Chancellor*.—The only question is, whether a man making bricks on his own estate, or on that which he rents, shall not be a trader liable to the statutes of bankruptcy, though he shall expose the bricks to sale. It seems here, as if he bought the soil, which founds two questions: first, whether the converting the soil into bricks for sale, would make him liable; second, if the buying the soil, and making it into bricks, will make him so.

Mr. Serjeant *Hill*, in reply, cited *Skin. 292.* and *Saunderson v. Rowle*, 4 Bur. 2064.

*Lord Chancellor*.—If I take the case right, the judge reported this fact, that after two persons had used the kiln, the bankrupt took it up and continued it with *Beet*, who was at half the expence of the kiln, and who was to be at the expence of getting the clay, the fire, &c. and to be allowed so much per thousand for the bricks which were to be the property of the bankrupt; that the clay was dug for the bankrupt, and under his authority, which made it the

\* *Newton v. Newton*, 1 Co. Bank. L. 76. (2d edit.)

† See the cases of *Patman v. Vaughan*, 1 T. R. 572. and *Bartholomew v. Sherwood*, *ibid.* 573. as to the quantum of the trading.

same as if he had the lord's licence to take the materials he found necessary for making the bricks; that the bankrupt engaged the other in the making the bricks, and in taking the materials out of the waste.—The judge's opinion given to the jury was, that if he kept a public sale kiln, he must be found a bankrupt. If it was true that he had set up a private kiln for his own use, and finding he had too many bricks, had sold the surplus, he could not have been a bankrupt; but if, after he had set up the kiln for his own use, he continued to employ it for sale, then the questions arise. I lay out of the case, the buying and selling in the form of bricks; that would not be an arguable case. I lay out of the case also, all that has been said of farmers, innkeepers, &c. exercising other trades: either they must be only consequential, or they must be beyond the measure of their own trade. I therefore think the case of the vintner, who sold five dozen of wine, hard measure (a). If a vintner will sell as a wine merchant, the quantity is not material; it is a separate article by which he seeks his living. If a great farmer would keep a chandler's shop, it would be in vain for him to say he was a farmer: the manner, more than the quantity, points that it is seeking his living. The principle of the old cases is, that the parties do not buy and sell, for though they buy, they do not sell in the same form. The effect of the distinction was found to be too large, as it would apply to a great many trades; as for instance, a distiller. The principle therefore received another application, and now if a man buys raw materials, and varies the form ever so much, it will be a trading. Clay and sand turned into bricks, would therefore be within the statutes. But there is another ground upon which it is more uncertain, where he vends the produce of his own estate; because that is not a buying; and therefore the cases have gone upon this, that the man merely selling the produce of his own land, he shall not be liable to be a bankrupt. It is not stated to have been decided that a great brick maker, making from his own estate, can in that respect be a bankrupt. The case of *Watkins v. Caddel*, is only a saying, as there the bankrupt bought iron. The case of the iron master would be like that of the sugar baker, who had the plantation; I should think if it was brought to a neat question, and the jury thought he only meant to bring his own produce to perfection, they would be right not to find him a bankrupt; but it would be very difficult to bring that idea before a jury, and the question would be, whether the man meant to carry on a trade, or merely to meliorate the produce of his own estate. It is very different where a man sets up to sell bricks, and goes about the country to collect materials; the collecting the materials will be held ancillary to the general purpose. Purchasing the earth by obtaining a licence to dig in the waste,

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(a) Vide *Patman v. Vaughan*, 1 T. R. 572. *Ex parte Moule*, 14 Ves. 603. *Ex parte Magennis*, 1 Rose, 84.

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might, and I think it would, be held to be for the purpose of carrying on the trade. Here the earth was not purchased, but taken by way of trespass, which would amount to obtaining a licence, and that brings it within the bankrupt laws; that it was not to improve his own estate, but a purchasing of the earth by licence, ancillary to carrying on the trade of a brick maker.

*Petition for a new trial dismissed.\**

BURNET

\* In the case of *Parker v. Wells*, in the Court of King's Bench, Michaelmas Term, 1785. A commission of bankrupt having been issued by the plaintiff, and he having been found by the commissioners a bankrupt, as a brick-maker, brought an action of trespass against the messenger under the commission, for the purpose of trying the question whether he was a trader within the bankrupt laws. The cause was tried, and the plaintiff found to be a bankrupt, but upon the point of law being argued in the Court of Common Pleas, the Court were of opinion, that under the circumstances of the case, the plaintiff was not a trader within the bankrupt laws, and Lord Loughborough pronounced that opinion in an argument of considerable length, a full report of which the reader will find in 1 Cooke's Bankrupt Laws, p. 52. 2d edit. Upon this judgment a writ of error was brought in the Court of King's Bench, which was argued in the term, and on Friday, November the 18th, Lord Mansfield delivered the unanimous opinion of the Court, as follows:

Lord Mansfield.

The question which arises upon this special verdict is, whether the plaintiff was a trader within the true intent and meaning of the statutes concerning bankrupts.

The verdict states a demise from the Archbishop of Canterbury, in the year 1767, to John Parker the father of the plaintiff, of an extensive farm of 800 acres, in which there was a parcel of brick-ground, for 21 years. It states similar demises to John Parker, the father of the plaintiff, prior to that in 1767, and also a subsequent similar demise to the plaintiff in 1780; and states that one William Berand, for 20 years and more, before the year 1768, rented the said parcel of brick-ground from the said John Parker the father, and made and sold bricks there. That the said William Berand died in the year 1768, and upon his death, the plaintiff took the said brick-ground into his own possession; and then and there bought certain materials and necessary things, which were of the said William Berand in his life-time used in making bricks there, at the valuation of £130, and then and there made bricks and tiles of the earth there, and sold them, and that during the time the within named John Dewy Parker the plaintiff, so held the said land, he made bricks and tiles for sale, of the earth and clay arising from the brick-ground, and bought sand and fuel, which were necessary ingredients for converting the earth and clay into bricks and tiles.

I shall make two questions,

First. Whether upon this verdict William Berand was a trader:

Second. If William Berand was a trader, whether upon this verdict, the case of the plaintiff can be distinguished, so as to make the plaintiff no trader.

Brick-making for sale, abstractedly considered, is in fact carrying on a trade, and seeking to live by the profits. Many things are necessary to be bought, which can only be paid by the money to arise from the sale of the bricks. The credit is given to no visible fund, but merely upon speculation, to the profits of the trade.

The objection is, that William Berand rented the brick-ground, and consequently that the bricks were the produce of his own land.

From the authorities and the reason of the thing, I take the true distinction to be this:

If a man exercises a manufacture upon the produce of his own land, as a necessary or usual mode of reaping and enjoying that produce, and bringing it advantageously

advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients; as in the case of a farmer who makes cheese, though he buys runnet and salt; or where a man makes his own apples into cyder, though there is an expence attending the operation, many things to be bought, and perhaps some mixture necessary: but it is the usual mode in the cyder counties, in which the owners of orchards turn their apples to profit, and bring them to market: or as in the alum case, where the operation was proved to be necessary: and the constant mode practised by all the proprietors of alum works; or in the case of coal mines, where raising them out of the pit is as necessary to the enjoyment of that species of produce, as reaping and thrashing is to the enjoyment of corn. But where the produce of the land is merely the raw material of a manufacture, and used as such, and not as the mode of raising the produce of land; in short, where the produce of the land is an insignificant article, compared with the expence of the whole manufacture; there in truth he is, and ought to be considered as a trader.

As this distinction turns upon the nature and manner of exercising the manufacture, and the motive with which it is carried on; it depends so much upon the light in which a jury sees the whole transaction, the law and fact are so blended together, that it is hardly possible to distinguish them, and, agreeable to what Mr. Justice Buller did in the case of *Ex parte Harrison*, I directed, when the question in this cause came on before me at Croydon, that if the plaintiff made bricks for the use of his own buildings, though he sold what he did not use, that they should not find him a trader; but, if they thought he carried on the trade for public sale, merely with a view to the gain he expected to arise thereby, they might find him a trader; and a special jury upon that trial found him a trader.

In this case *William Beraud* took the brick-ground with a view to carrying on a trade for public sale; the land producing nothing, the lease is merely a purchase of the clay, and just the same as if he had bought it by so much a load: he had nothing to do as a farmer; his sole object was making bricks for sale; therefore we think he must be considered as a trader.

Second question: Whether the case of the plaintiff can be distinguished so as to make him no trader?

Upon the death of *Beraud* in 1768, he took possession, paid for the stock, and carried on the trade in like manner, and made bricks for public sale. He lived with his father, and had, in fact, a joint occupation of the farm with his father; but the father was the lessee, and suffered the plaintiff to take the brick-ground solely. The father had no concern in it, was liable to none of his debts upon that account, and therefore the farm and the brick-ground were as distinct, after the plaintiff carried on the trade, as they were in the time of *Beraud*.

The plaintiff had no lease or interest in the farm 'till 1780, but from 1768, he is permitted by his father, upon the death of *Beraud*, to come in his place, and carry on the trade of brick-making for sale, as *Beraud* had done for many years.

The lease in 1780 is immaterial, if he traded from 1768, that is sufficient: during that time he only occupies an old brick-kiln, long used for public open sale, and makes and sells bricks accordingly.

The plaintiff acted just as *Beraud* had done, merely in the capacity of a common brick-maker for sale—*Beraud* rented the brick-ground as the mode of buying the clay.—Whether the plaintiff paid for the clay, or had it by gift from his father, makes no difference, as to the capacity in which he dealt; which we think was that of a trader.

*The judgment of the Common Pleas reversed.*

From this judgment of reversal, the plaintiff appealed to the House of Lords, where the case being argued, the following questions were put to the judges.

1. Whether the finding be sufficient whereupon to grant final judgment.
2. If the finding be insufficient, what award is to be made on such finding.
3. If the finding be sufficient, whether, upon such finding, the plaintiff in error appears to be a trader within the meaning of the statutes concerning bankrupts,

On

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*Ex parte*  
**HARRISON.**

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Ex parte  
HARRISON.

On Tuesday, 15th March, 1787, the Lord Chief Baron delivered the unanimous opinion of the Judges present upon the first question in the negative and upon the second question that a *venire facias de novo* ought to be awarded. Whereupon it was ordered, that both the judgments should be reversed, the special verdict (being insufficient) should be annulled, and that the Court of King's Bench should award a *venire facias de novo*, and proceed according to law.

The plaintiff did not proceed on the *venire de novo*, but brought a fresh action in the Common Pleas which was afterwards dropped, and an action brought in the King's Bench, which was tried before Mr. Justice Buller and a jury, 7th December, 1787, the jury found a special verdict (a); but it appeared that the plaintiff had left off brick-making at the time when the petitioner's debt accrued due; the defendant waived the special verdict, a general one has been entered for the plaintiff. See 1 Co. B. L. 67. (2d edit.

(a) Lord Eldon has observed, that he knew no instance except the present, in which, where a bankrupt was contesting his commission, there had been a special verdict. 1 Ves. & Bea. 220.

(b) This point has not come under judicial consideration in any case subsequent to *Ex parte Harrison*, and *Wells v. Parker*. In *Sutton v. Wesley*, 7 East, 442, the subject was much discussed, but the decision does not materially affect the question, as in that case the alleged bankrupt took by devise, a freehold interest in the brick earth, and could not therefore be considered as buying any thing which he sold again. In the two former cases, the earth employed in making bricks was acquired for that very purpose. It seems however now

to be well understood, that the distinction comes within Lord Roslyn's definition, that where the business is carried on as a mode of enjoying profits of a real estate, it is no trade but when carried on substantially independently as a trade, it is within the bankrupt laws. Co. 7th edit. p. 58. And it seems there is no difference whether one is a termor or a freeholder. For the same species of interest but shorter duration, and therefore principle must apply. *Ex parte Limore*, 2 Rose, 424. Et vide *Ex parte Ridge*, as to trading as a lime burner, 1 Rose, 316. 1 Ves. & Bea. 361. *Ex parte Gardner*, 1 Rose, 377. 1 Ves. & Bea. 45, which was the case of a person selling stone delivered from his quarry.

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S. C.  
3 Dick. 602.

## BURNET v. BURNET.

A special direction to the Master in settling an infant's allowance to consider the birth of a posthumous child, refused.

MR. Scott, moved for an increase of allowance to an eldest child and that there might be a special direction to the Master making the allowance, to consider that a *posthumous* child born since the former report, by which the present allowance given, who was unprovided for. To shew that such orders had been made, he cited *Miss Lanoy v. The Duke of Athol*, 2 Atk. 444. *Petre v. Petre*, 3 Atk. 511, and a case before Sir Thomas Clarke, where he made such a special reference. But the Chancellor refused to make any such special direction, and referred it generally to the Master, to consider of a proper advance.

(a) As to maintenance, vide *Pulsford v. Hunter*, post, vol. iii. 416.

WY.



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## WYNNE v. HAWKINS.

THE plaintiff is the only surviving child of *William Wynne*, who was the only son of *John Wynne*. *John Wynne*, by will, dated in 1773, gave some pecuniary legacies, and then went on as follows: "and as I have lately received the melancholy account of the death of my dear son *William Wynne*, at *Bengal*, who has left a widow and two small children, and I am informed he died worth five times the fortune I shall leave behind me, which will be a handsome provision; and as I shall leave behind me, over and above the said legacies, only sufficient for a decent maintenance for my loving wife *Mary Wynne*, by whose prudence and economy I have saved the greatest part of the fortune I shall die possessed of, *not doubting but that she will dispose of what shall be left at her death to our two grand-children*: all the rest and residue of my personal estate, goods, chattels, monies in the stocks, plate, jewels, watches, and household furniture, and whatever else I shall be possessed of at the time of my decease, I give and bequeath to my loving wife *Mary*, hereby constituting and appointing her sole executrix." The testator died in *September 1775*. The wife died intestate, *July 1781*, and this bill was filed by the surviving grand-child, against her personal representative, for an account of, and to be paid such part of the estate of the grandfather, as remained undisposed of by the wife during her life. And the question was, whether these words made an absolute devise to the wife, or operated as a remainder over.

Devise to testator's wife, *not doubting she will give what shall be left to my grand-children*, not sufficiently certain to raise a trust.

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Mr. *Mansfield* for the plaintiff.—The words "*not doubting*," are as strong as those made use of in any of the cases, such as *request* or *desire*, they express a thorough confidence. He cited 9 Mod. 122, *not doubting she would* be kind to his children,—no objection was made to the force of the words *not doubting*. The words in the Institute, are *peto, rogo, mando, fidei tuæ committo*, and have always been held compulsory.

Mr. *Hardinge* on the same side, cited *Harland v. Trigg*, (ante, 142.) *Harding v. Glyn*, 1 Atk. 469.—2 Vern. 466.—Pra. Cha. 200. S. C. *Trott v. Vernon*, 1 Eq. Ab. 198.—8 Vin. from 70 to 72.—1 Ves. 107.—there is no case where the word *desire*, has not been held imperative, though there have been cases where the decree has been contrary, on account of the uncertainty of the person intended. The cases 2 Vern. 559,—10 Mod. 404. are too strong



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strong to argue from. That of *Harland v. Trigg*, is quite out of the reason of this case,—hoping he will *continue them in the family*, is quite uncertain as to the persons, 2 Eq. Ab. 291.

Mr. *Attorney-General* for the defendants, cited *Bland v. Bland*\*, in 1745, and *Birkhead v. Coward*, 2 Vern. 116.

*Lord Chancellor*.—If a bill had been filed in the life-time of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear, what was to be given, and to whom, I should think the words *not doubting* would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and where that does not appear, the scale leans to the presumption, that he meant to give the whole to the first taker. Here he looked upon the provision made by the father of the grandchildren as an ample provision, and meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue such as she chose. If he had meant imperatively, he might easily have used such words as would have effected his intention: but it is impossible, upon any rule of construction, to make these words an order upon her to pass the property over.

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*Bill dismissed †.*

\* Cited and stated vol. ii. p. 43.

† See *Pierson v. Garnet*, vol. ii. p. 38—226. (a).

(a) See also the Editor's note at the conclusion of it.

#### BARNES v. ALLEN.

Devise of the residue of personal estate to the wife for life, if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead, to

the survivor; they both died in the life of the wife, the legacy was vested in both as joint-tenants, and therefore goes to the representative of the survivor.

**T**HOMAS ALLEN, by will, 3d *January*, 1758, devised the *residuum* of his personal estate to his wife for life, and, after her decease, to their children; but “if it should happen that my wife shall depart this life, leaving no child or children at the time of her death, then my will is, that my trustees shall transfer the securities in which my estate shall then be vested, to my two brothers, or if either of them shall depart this life without issue,

“ then

" then to the survivor, and I hereby give the same to *John Allen* and *Henry Allen* accordingly." *Henry Allen* survived *John Allen*, but was since dead. The bill was filed by plaintiff *Barnes*, executor of *Henry Allen*, against the widow of the testator, and the representative of *Bridget Ashe*, niece of the testator, and also the representative of *John Allen*, the other brother, to have the whole of the testator's estate secured for the benefit of the plaintiff, subject to the life interest of the defendant, the widow.

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~  
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Mr. Solicitor-General and Mr. Lloyd for the plaintiff.—The brothers took vested interests, subject to the life of the wife.—*Pinbury v. Elkin*, 1 P. W. 568.—*Smith v. Ball*, 1 Eq. Ab. 245. 2 Vent. 347, an anonymous case cited in *Pinbury v. Elkin*. If an estate is given with a charge, it will vest though the party die, *Dawson v. Killet*, last Michaelmas Term, (ante, p. 119.)

Lord Chancellor.—The survivorship, and the taking by survivorship, must be at the death of the wife, and then the question is, both being dead, whether it ever could attach.

Mr. Attorney-General for the defendants.—Where the words are, if the party shall die without issue, the legacy must fail, if the legatee dies before the first taker. *Norris v. Huthwaite*, 13th November, 1777, in the *Exchequer*\*.

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Lord Chancellor.—The case in *Ventris* is confirmed by *King v. Withers*, (For. 117.)—A contingent interest may vest in right, though it does not in possession. I take it to be clear, that if a testator gives a legacy upon a contingency, unless the contingency happens, the legacy does not vest; but the case of an executory devise is, that the interest of the first taker, and that of the subsequent taker, vest at the same time. Contingent or executory interests, may be as completely vested as if they were in possession. In the case in *Ventris*, the contingency was only as to the possession, but there the interest was so vested that it might be transmitted.

It stood over till the first day of causes after term, when Lord Chancellor declared it to have vested in the two brothers, (who

\* In that case, *John Smith* gave all his mortgages, bonds, and the rest of his personal estate (a), to his wife, upon the following considerations, (int. al.) that at the decease of his said wife, or if she should marry again, £500 be paid to sister *Sarah Smith* out of the afore-mentioned estate, within six months after her decease or marriage.—*Sarah Smith* died, living the wife; and the bill was filed by her representatives against the executrix of the wife, but was dismissed without costs, on the ground that the legacy was not given till after the wife's death, or second marriage, and therefore lapsed by the death of *Sarah Smith* in the life of the wife.

(a) In both my MSS. notes of this case it is real and personal, 11 MSS. 414. 13 MSS. 211. Et vide post, 299. (Serj. Hill.)

survived

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survived the testator, but were since dead) as joint-tenants, and *Henry Allen* having survived *John*, the residue, subject to the wife's interest for life, belonged to the plaintiff, the personal representative of *Henry* (a).

(a) As to the question of joint-tenancy, vide *Perkins v. Baynton*, ante, 118. As to vesting, *Dawson v. Killet*, ib. 119.

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S. C.  
2 Dick. 603.

THOMAS BROOKS, D. D. and ELIZABETH his Wife, late ELIZABETH ADAMS, Widow and Executrix of JAMES ADAMS, Esq. deceased, } Plaintiffs.

FRANCES REYNOLDS, Widow, - - - Defendant.

There being a decree for payment of debts, &c. on the suit of the trustees, though the parties have not proceeded under that decree, a creditor restrained by injunction, from proceeding at law against the executor.

**JAMES ADAMS**, Esq. by his will gave the greatest part of his plate and linen, together with other considerable specific legacies, and all his ready money and securities for money, arrears of rent and debts due to him at his decease, to his wife the plaintiff *Elizabeth*, then *Elizabeth Adams*, for her sole use and disposal, and appointed her executrix of his will, and gave her the use of the rest of his household goods and furniture for her life, and devised to her considerable real estates for her life, and gave to *George Howland* and other trustees, all other his freehold and leasehold estates in particular places, and the estates devised to his wife for her life, after her decease, and also his household goods and furniture given to his wife for life, after her decease, and all other his freehold, leasehold and personal estates upon trust for his children, if he should leave any at his decease, and if he should die without leaving issue, upon trust to sell part of his freehold estates, and apply the money arising thereby (after payment of his debts) among the children of his niece *A. Stonnell*, and of his niece *E. Williamson*, who should be then living, and to convey his freehold, leasehold and personal estates devised to his wife for her life, to his nephew *James Williamson*, his heirs, executors, &c.—*James Adams* died in 1775, without issue, and the plaintiff *Elizabeth* proved his will and possessed his personal estate, except his leasehold estate; and *Howland* and his co-trustees entered on the real estates, directed to be sold. In *Hilary* term 1777, *Howland* and his co-trustees filed a bill against the present plaintiff *Elizabeth*, the testator's heir at law, and the persons claiming under his will, for the directions and indemnity of the Court, in executing their trust; and, by a decree in that cause 18th *December*, 1777, the will was established, proper accounts were directed, and it was ordered that the personal estates, not specifically bequeathed, should be applied in payment of the testator's debts, funeral expences, and legacies, in a course of administration, and that the clear residue, if

if any, should be paid into the bank; but in case the personal estates, not specifically bequeathed, should not be sufficient for payment of the testator's debts, any of the creditors should be at liberty to apply to the Court for payment of what should be remaining due to them, after application of such personal estate in payment thereof, as there should be occasion. Proceedings were had under this decree, but no report was made; and the defendant *Frances Reynolds*, a bond creditor of the testator, in *Easter*, 1782, brought an action against the plaintiff *Elizabeth* upon the bond. Upon this the plaintiffs filed the present bill, stating this case, and that the testator died indebted to several other persons, and that the personal estate, not specifically bequeathed, was not near sufficient to pay his debts and funeral expences, but that the plaintiff *Elizabeth*, having in her hands the personal estate specifically bequeathed, had assets to pay debts, and could not defend herself at law; and the bill therefore prayed that the defendant might be compelled to seek payment of the bond, under the decree, that the plaintiff might be quieted in the enjoyment of the personal estate specifically bequeathed to her, and that the defendant might be restrained by injunction from proceeding at law. The defendant by her answer, said she knew nothing of the decree but from the bill, and insisted that the personal estate specifically bequeathed, as well as the personal estate not specifically bequeathed, was subject to her demand, and that she had a right to proceed in her action; that the trustees of the real estate, were engaged in a litigation concerning that estate, which might be many years depending, and that she ought not to be compelled to wait the event, especially as her debt bore only £4 *per cent.* interest. After filing the bill, an injunction had been obtained for want of an answer, and, upon shewing cause against dissolving the injunction after the coming in of the answer, it was insisted, on the behalf of the plaintiffs, that the creditors of the testator were bound by the decree in 1777: and for this the counsel cited the case of *Martin v. Martin*, 1 Ves. 211, and *Douglas v. Clay* (a), before Lord Camden, 21st February, 1767, where it was held that a decree at the suit of creditors against an executor, for an account of the personal estate of the testator, will bind other creditors, and if they sue at law the Court will award an injunction.

Mr. Mitford, for the defendant, endeavoured to take a difference between this case and those of *Martin v. Martin*, and *Douglas v. Clay*, that the bills in those cases were filed by creditors where the decree was in the nature of a judgment, in their favour; but, in this case, the bill was filed by the trustees: that in the case where a bill was filed by a creditor, those who come in contribute to the suit,—that here there was no order for creditors to come in, and

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(a) 1 Dick. 693. 10 Serj. MSS. MSS. 263.

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that they could not make themselves parties, but must wait till the other parties chose to carry the decree into execution; and then must abide by the decree, however erroneous, as they could not re-hear the cause; and, if any party should die, they could not revive the suit, but must bring a new bill to have the benefit of the decree.—And as this was the first instance of an application to restrain the proceeding at law, upon the ground of a decree to which no creditor was a party, it ought not to prevail. But *Lord Chancellor* thought there was no difference, for the creditors here may come in before the Master, and the reason why the injunction is granted is this, that this Court, having taken the fund into its own hands, will not permit the executor to be pursued at law (a).

*The order was discharged, and the injunction continued.*

(a) Where the Court has made a decree for the administration of assets, that decree is in the nature of a judgment for all creditors, and the Court will interpose by injunction against creditors subsequently suing at law, either at the application of the executor, or of an heir at law against bond creditors, or of the plaintiff in equity being a creditor. *Morris v. The Bank of England*, For. 117. 4 Bro. P. C. 287. Ed. Toml. *Martin v. Martin*, 1 Ves. 210. *Douglas v. Clay*, 1 Dick. 393. *Hardcastle v. Chattle*, post, vol. iv. 163. *Paxton v. Douglas*, 8 Ves. 520. *Brook v. Skynner*, 2 Meriv. 482. *Dyer v. Kearsley*, and *Cox v. King*, cited ib. and the injunction will not only be granted to stay execution, but extended to stay trial. *Kenyon v. Worthington*, 2 Dick. 668. *Goate v. Fryer*, 2 Cox, 201. But as the ground of this jurisdiction is (as above stated) the circumstance of the Court having

taken the fund into its own hands, and as this can only be done by the operation of a decree, the Court will in no instance interpose before a decree. See the case before *Sir Joseph Jekyll*, mentioned by *Lord Hardwicke* in *Martin v. Martin*, 1 Ves. 213. *Rush v. Higgs*, 4 Ves. 638; and in like manner a mere decree for an account of the demand of a creditor, and of the personal estate come to the hands of the executor, with a direction for payment out of the result of the account, is not a decree to prevent the executors paying a judgment. There must be a report and final decree upon it, *Perry v. Phelps*, 10 Ves. 34. For other points connected with this subject vide *Hardcastle v. Chattle*, post, vol. iv. 163. *Paxton v. Douglas*, 8 Ves. 521, the cases cited above from *Mr. Merivale's* reports, and *Farrel v. Smith*, 2 Ba. & Be. 342.

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## HILARY TERM.

23 GEO. III. 1783.

## SMITH v. GUYON.

Where land is ordered generally to be sold, and the money to be part of the personal estate, the purchaser is not bound to see to the application of the money.

**T**HE testator ordered his copyhold estate to be sold, and the money arising therefrom to go into the mass of his personal estate, and then ordered his personal estate, (subject to his debts) to be divided into four parts, one-fourth part to A. another to B. and the remaining two-fourth parts to secure the payment of certain annuities given by the will. The question was, whether the purchaser was bound to look to the application of the purchase money.

money. By *Lord Chancellor*, the purchaser is a mere stranger, and is not bound to look to the application: where the estate is to be sold, and a specific sum, as £5, to be paid to *A.* the purchaser must see to the application, but where it is to be sold generally, he is not\*.

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\* The same general doctrine had been laid down by the late *Sir Thomas Sewel*, when Master of the Rolls, in a case of *Tenant v. Jackson*, and *Cotton v. Everall*, the 10th of February, 1774; and he cited, in support of it, *Langley v. Lord Oxford*, the 11th of May, 1748. It was also adopted by *Lord Kenyon* upon a rehearing of the former named cause (a).

In *Jebb v. Abbot*, the 9th of February, 1782, (cited by *Mr. Butler* in his note on *Co. Lit.* 290, the 14th edit.) *Lord Chancellor* said, where debts and legacies are charged on lands, the purchaser will hold free from the claim of the legatees, for not being bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts. And in the case of *Beynon v. Gollins*, (reported on a different point, post, vol. ii. p. 323, and cited in the same note by the name of *Beynon v. Gibbs*), the bill was dismissed as to the purchasers, with costs, they not being bound, under the charge, to see to the application of the purchase-money. Vide *Spalding v. Shalmer*, 1 Vern. 301, where it is held, that if debts are particularly specified the purchaser must see to the payment; but if more is sold than is sufficient, he is not obliged to enter into the account. Vide also *Dunch v. Kent*, ibid. 260, and *Ithell v. Beane*, 1 Ves. 215, and *Rogers v. Skillicorne*, Amb. 188 (b).

(a) See these cases referred to by *Mr. Sugden* from the Register Book, B. 1773. fol. 120. 481. B. 1747. fol. 300. Vend. & Purch. 436. 5th edit.

(b) As to the obligation of a purchaser to see to the application of the purchase-money, the reader is referred to the admirable Treatise of *Mr. Sugden* on Vendors and Pur-

chasers, p. 434, et seq. 5th edit. which contains every thing that is to be found on the subject. The Editor has in vain searched every public and private collection of MS. reports, to which he had access, for the judgment of *Lord Thurlow* in the case of *Cuthbert v. Baker*, which is there referred to.

## NEWMAN v. NEWMAN.

## Appeal from the ROLLS.

S. C.  
18 Serj. Hill's  
MSS. 96.

**A**N estate had been settled, upon the marriage of the late *Mr. Newman* with the appellant, his now widow, on the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife in fee, and a bond given to secure the sum of £30 per ann. to the wife, in case she should survive, as a further provision. By will in 1768, the testator devised another real estate to the wife for life, remainder to the issue, if there should be any; in default of issue, then to her in fee, in bar of her other claims, and gave her the residue of his personal estate, after some specific and pecuniary legacies, in the same manner, and made her executrix; but the will was not duly attested to pass real estate. The question was, whether the widow should take the personal estate together with her other claims, or must elect between them, although the real estate could not pass

The wife being entitled to a settled estate, the husband gives her by will an interest in another estate, and all his personal property, in lieu of her claims. The will is not duly attested to pass real estate, she cannot take the devised land, but must elect between the personal estate alone, and her claims under the settlement.



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by the will. It was heard at the Rolls, and his Honor decreed that she must elect, but postponed the election, 'till an account taken of the personal estate.

And now on appeal from the Rolls,

Mr. *Attorney-General*, Mr. *Poole*, and Mr. *Harvey*, for the appellant, insisted she was not bound to make any election, but might take both the personal estate under the will, and likewise what she claimed under the settlement: that it depended on the intention of the testator, who meant to give her the real as well as personal estate, in exchange for her claims, and therefore, as she could not take the whole provision he had made for her, she should not be bound to make her election. On the other side it was contended, she could not take under the settlement, without giving up whatever she took by the will, and for this was cited *Boughton v. Boughton*, 2 Ves. 12.

*Lord Chancellor*.—The will relating to real estate, and not being duly attested, is, so far, out of the case. The words extend to all her claims.—The thing required is, that I should confine general words to particular devises.—There is no room for the question. His Honor's decree is right (a).

(a) As to the doctrine of election, vide *Pearson v. Pearson*, post, 292, and *Finch v. Finch*, post, vol. iv. 38.

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1779. Lincoln's  
Inn Hall, Feb. 23,  
1783.

Personal estate bequeathed to F. H. her executors, administrators, and assigns, but "in case of the death of F. H. without issue," remainder over; this remainder over is too remote, as it must be construed a general dying without issue.

(e) BIGGE v. BENSLEY.

**H**ARRIS, by his will, made in the *East Indies*, and bearing date 15th *January*, 1749, bequeathed all his personal estate to his wife *Frances Harris*, to hold to her, her heirs, executors, administrators and assigns, for ever, and appointed her sole executrix, but in case of the death of *Frances Harris* without issue, then he gave the whole to the eldest son of his brother *Richard Harris*, his heirs, executors, administrators and assigns, and if there should be no such son, then to his said brother *Richard Harris*. The wife survived her husband, married the defendant, and is since dead without issue. The defendant, who survives her, claims the whole interest in her right. The bill is brought by the plaintiff, claiming under the devise over. This cause was heard in *Michaelmas* Term 1779.

Mr. *Attorney-General* for the plaintiff.—The wife proved the will, and married the defendant. If the application of the words,

(e) *E. contra Knight v. Ellis*, post, vol. ii. 570.

" if



"if she die without issue," be a dying without issue living at the time of her death, then the devise over is good. There was in this case, a further supposed event, that *Richard Harris* should have no son, then the devise was in favour of *Richard Harris* himself. If the testator meant a dying without issue indefinitely, it could not affect the son of a person then living, much less that person himself. The event must be decided at the death of *Frances Harris*. Till the time of *Dormer v. Beauclerk*, 2 Atk. 308, the words *dying without issue*, were construed as they were generally used. In a late case *Keily v. Fowler*, 1st February, 1768, Fearne C. R. 368, 3d edit. (a) 6 Bro. P. C. 309 (b), the opinion of the judges, given in the House of Lords, put the authority of *Dormer v. Beauclerk*, very much out of the case, except where the circumstances are the very same, *Target v. Gaunt*, 1 P. W. 432. *Pinbury v. Elkin*, 1 P. W. 563.

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 v.
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Lord Chancellor.—Was not the argument in *Keily v. Fowler*, that the obvious meaning of the words was a general failure of issue, but controllable by words or circumstances? I take it, that in a general sense they go to a general failure.

Mr. Selwyn on the same side.—The defendant insists that it was a gift of the whole to the wife. The words are to be taken in their obvious sense, *Forth v. Chapman*, 1 P. W. 663. Till *Matthew Manning's* case, there was no limitation over of personal estate, after that a number of cases carried the doctrine much farther.—There is a difference where the remainder is vested or contingent; if it be contingent, it may be good or bad according as the event turns out, *Target v. Gaunt*,—*Pinbury v. Elkin*,—*Gower v. Grosvenor*, Barnard. 58.—*Sabbarton v. Sabbarton*, For. 245. *Shepherd v. Lessingham*, 30th October, 1751 (c), where the word *leaving*, occasioned the determination that the limitation was not too remote.

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Mr. Madocks for the defendants.—In *Pinbury v. Elkin*, and *Forth v. Chapman*, the first disposition was for life only.

Mr. Kenyon on the same side.—The rule is, that whatever words would give an estate tail in land, will give the whole interest in personalty, *Duke of Norfolk's* case, 3 Ch. Ca. 1.—*Prima facie* "to a man and his heirs," signifies the whole interest, unless there are words to shew the testator meant issue living at the time of his death. In *Forth v. Chapman*, the word was *leaving*, this does not appear in *Peere Williams*, but Lord *Hardwicke* in the case of *Dormer v. Beauclerk*, said he was counsel in that case, and that great weight was laid upon the word *leaving*,—Lord

(a) Edit. 6, p. 482. (b) Edit. Toml. vol. iii. 299. (c) 11 Serj. Hill's MSS. 303.
Hardwicke

1782.

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Hardwicke uniformly made the distinction. In *Dormer v. Beauchamp*, the words were very like those in this case. In *Keily v. Fowler*, the executors *nominatim* were to distribute the property. In *Daw v. Lord Chatham*, reported by the name of *Lord Chatham v. Tothil*, 6 Bro. P. C. 450, the whole argument proceeded upon the allowance of this principle. *Saltern v. Saltern*, 2 Atk. 376. The inclination of Lord *Hardwicke* was to lock up property, but he could not give effect to limitations of this sort.

Mr. *Attorney-General* in reply.—It would be hard if no other words would supply the place of the word *leaving*: *dying without issue*, signifies *without leaving issue*. The death of *Frances Harris*, is the circumstance which regulates the question; it is to be decided *then*; if the brother takes then, he takes absolutely; if he does not take then, he never takes. If he had a son born after the death of *Frances Harris*, that son could not take: so it is of the father if there be a son at that time. The question is, who is the person to take at the death of *Frances Harris*. This is a much stronger circumstance than any of those in the cases. The circumstances of *Keily v. Fowler*, were very slight to take it out of the rule. Mr. *Fearne* states it to be that the executors were to make the distribution. I believe all the confusion has arisen from attempting to lay down a rule. In *Daw v. Lord Chatham*, the question was not applicable, the reason there was, that *Leonora* taking by express words an estate tail, the remainder over was not good.

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Lord Chancellor.—I agree with you that the general sense of *dying without issue* is at the time of the death (a). That is the grammatical construction, and is the sense in general of those who use the words. There should be as little contradiction as may be in the determination of the Court, the words *leaving*,—and *after*, go far towards overturning the rule. It would be better sense to say that in *Keily v. Fowler*, there was no other rule than Mr. *Fearne's*. The contingency cannot be fixed until the period of the former event is fixed. It would vest in the father and son, and would transmit. If the father had issue which died, and then the first taker died, the father would take, if the period was to be the death of *Frances*. I shall not go further than I am obliged by the cases, in determining against what I think the meaning of the testator, which I am afraid I must do, or overturn the established rule. I did not know it was to come on to-day, and meant to look into the cases before the first day of causes after Term.

It stood over for judgment.

(a) Sir *W. Grant*, in the late case of *Dow v. Penny*, 1 Meriv. 22, noticed the inaccuracy of the report of this case, as there is a contradiction between the

two passages, the one printed in italics here, the other in the subsequent judgment.

February

February 23, 1783, Lord Chancellor gave judgment in this cause. The reporter was absent, but has been favoured with an accurate account of what passed.

1783.

BROGE

v.

BENLEY.

Lord Chancellor.—The first question is, what, abstractedly from little points and circumstances, would be the effect of the gift to *Frances Harris*. There is not a single case, not even that of *Atkinson v. Hutchinson*, (3 P. W. 258.) which does not hold that such a limitation, after these general words, is too remote. I shall notice only *Dormer v. Beauclerk*, in Atkyns, it is a very good note. The general words are to be varied only by circumstances arising upon fair demonstration. There are not less than 57 cases upon this point. To call dying without leaving issue, the natural sense of dying without issue is against all the cases. In this case there is no one circumstance which has occurred in the others. In *Dormer v. Beauclerk*, it was held that the word *then* could not and never did make the difference. It is merely a word of relation, not an adverb of time. Upon Lord Hardwicke's authority, I must hold the word *then* does not make a difference. As to the gift of the brother, *Dormer v. Beauclerk*, is a stronger case as to that point. It was argued there upon the circumstance of the £5,000 being meant as a portion, that being a maintenance, and given after a dying without issue, it must mean leaving no issue (a).

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Bill dismissed.

(a) The cases upon this subject which even in Lord Thurlow's time were so numerous, as to excite the above observation, have multiplied so extremely, that it is impossible to do more in the present publication, than to refer the reader to Mr. Bridgman's Digest, where they are collected and arranged, vol. ii. 244. To these may be added, *Salkeld v. Vernon*, 1 Eden, 72. *Gray v. Shawne*, ib. 153. *Taylor v. Clarke*, 2 Eden, 202. *Grey v. Montagu*, ib. 205.

Horston v. Ives, ib. 216. *Destouches v. Walker*, ib. 261. *Bodens v. Lord Galway*, ib. 297. *Sprigge v. Jeffery*, 1 Cox, 63. *Doe*, dem. *Ellis v. Ellis*, 9 East. 382. *Barlow v. Salter*, 17 Ves. 479. *Lyon v. Mitchell*, 1 Mad. 467, and the report of *Tothill v. Pitt*, subjoined to it. *Donn v. Penny*, 1 Meriv. 20. *Brounker v. Bagot*, ib. 271. *Elton v. Fason*, 19 Ves. 73. *Britton v. Twining*, 3 Meriv. 183.

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GODWIN v. MUNDAY.

JOHAN MUNDAY, seised in fee of an estate, by his will, bearing date the 18th June, 1757, devised the same to his second son *James* and his heirs for ever, after the decease or marriage of his (the testator's) wife *Elizabeth*, with a proviso that he should pay unto the testator's daughter *Mary*, then wife of the plaintiff, and since deceased, the sum of £100, and unto *Martha* £80, to be paid within one year after the death or marriage of his wife. The testator died some time after, leaving *Stephen* his eldest son and heir at law: *Elizabeth*, the widow entered, *Mary Godwin* died 19th May, 1774, *Elizabeth* the widow died 4th of November,

In Court, Easter
1776, Lincoln's-
Inn Hall, 17th
March, 1783.

Devise of estate
to second son J.
after the decease
or marriage of the
wife, charged
with £100 to tes-
tator's daughter
Mary.—*Mary*
died living the
wife, but held the
legacy vested in
Mary, and trans-
missible to her
representative.

1783.

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v.
MUNDAY.

November, 1776. The plaintiff obtained letters of administration to his wife *Mary*, and filed this bill for £100 given to her charge upon the estate.

This cause was heard in *Easter Term* 1779.

Mr. *Ambler* for the plaintiff.—The question is, whether legacy vested in *Mary Godwin*. The legacy vested in her much as the estate did in *James Munday*. The proviso operates as a charge upon the land. These words “so as” “provided” “in consideration whereof” all operate as charges, *Bacon v. Clerk*, Pr. Ch. 500.—*Oke v. Heath*, 1 Ves. 135.—*Kite v. Bland*, 1743, which was, I give to Lord —, all my goods, paying legacies contained in a schedule.—* *Pawsey v. Edgar*, before Lord *Bathurst*.—Where it is uncertain whether the time will come or not, the Court has said it shall not be raised, unless it is waived. † *Fry v. Fry*, 27th June, 1753, devise to testator's wife for 20 years remainder in tail, and a legacy payable to his daughter, within year after the death of the wife, the daughter died in the life of mother; the question was, whether this legacy sunk into estate: Lord *Hardwicke* said the rule was, that if the legacy payable at a particular time, and the child dies before that time the legacy shall sink, because it is never wanted. But this case is not within that rule. There was an attempt to test it where the party died within the year after the death of the person, a year after whose decease it was to be paid. *Hodgson v. Rawson*, 1 Ves. 44, where Lord *Hardwicke* held it vested, and that the time was only given to the remainder-man.

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S. C.,
3 Dick. 531.

* *Pawsey v. Edgar*, Lincoln's-Inn-Hall, 17th December, 1776.

Testator, by will, dated 9th April, 1739, devised real estate to his wife *Temperance* for her life, remainder to his son *Robert* in tail male, remainder to his (testator's) right heirs in fee, upon condition that *Robert*, or those then in possession of this estate, should, within six months after the death of testator, pay his two daughters, *Mary* and *Temperance*, £1,200, viz. £600 to each, at interest at £5 per cent. from the death of their said mother, with power of payment to the daughters, in default of payment: August, 1739, testator died, April, 1754, *Temperance* the daughter died, December 21, 1754, *Temperance* the mother died, 1774, *Mary* the other daughter died, having administered to her sister *Temperance*, but never claimed the £600 so bequeathed to her sister *Temperance*. The personal representative of *Mary* and *Temperance*, brought the bill against *Robert* as heir at law, and devisee of the testator, for this sum of £600 bequeathed to *Temperance* the daughter, with interest from the mother's death in arrears, and upon the authorities of *Hutchins v. Foy*, and *Hodgson v. Rawson*, the Chancellor determined that the charge vested with the land, and decreed for the plaintiff.

† A very accurate note of this case, which the reporter has met with, rests on the Chancellor's argument on two grounds: the one, that the daughter *Jane* was unmarried, and before the time of payment: and therefore that the case was not governed by the circumstances that induced the Court in *King v. Withers* to take it out of the general rule: the other, that in the will the testator made provision for another daughter *Eleanor*, out of a different part of the estate, he had shewn his intentions that it should not go to her representative, because he had expressly given it to *Jane*, in case she should survive her.

turn himself round. Lord *Hardwicke* there held it vested and transmissible, because the devise of the estate vested immediately, so also he decreed in *Lowther v. Condon*, 2 Atk. 127.

Mr. *Waller* on the same side.—Where the payment is merely postponed for the benefit of the estate, the legacy will not sink. Here the testator meant that *Mary* should have the £100 when the estate should come into possession, and that the son should then pay the charge. The charge vested at the same time with the estate. *Hall v. Terry*, 1 Atk. 502, has been since varied from and particularly in *Hutchins v. Foy*, Com. Rep. 716. (cit. 1 Ves. 47.) which is exactly this case.

Mr. *Madocks* for the defendant.—There is one rule to be drawn from all the cases, that wherever land is charged with a payment, whoever takes the land takes it *cum onere*; but if there be a condition to be performed by the person taking, and the time is annexed to the payment, if the legatee dies before the time of payment, the legacy sinks, *Hodgson v. Rawson*, before Lord *Hardwicke*, *Smell v. Dee*, before Lord *Cowper*, 2 Salk. 415.—*Bacon v. Clerk*,—*Wellock v. Hamond*, Cro. Eliz. 204.—In * *Thompson v. Dow*, before Lord *Northington*, a right of entry was given, which was held to vest it.


Mr. *Ambler* in reply, cited † *Morgan v. Gardiner*, in the Exchequer, as in point.

This cause stood now for judgment.

Lord Chancellor.—In the case of portions sinking because the party never attained such an age as to want them, Lord *Talbot* said, it was *causa data & non secuta*, *King v. Withers*, For. 117. Even if the reasoning in that case should be thought too nice,

* *Thompson v. Dow*, 1763.—The testator, seised of a reversion in an estate, expectant upon the decease of his aunt, by his will devised this estate to his wife for life, remainder to *John Dow* in fee; subject to the payment of £200 to his daughter *Elizabeth*, six months after his wife's decease, with power for the daughter in default of payment to seize the rents.—*Elizabeth* died in 1750.—The mother in 1754.—The aunt in 1760.—Lord *Northington* held this a vested interest in the daughter, and decreed the £200 to be paid with interest from the decease of the aunt, it appearing from the words of the will, that the son was to pay this £200 out of the rents of the estate.

† *Morgan v. Gardiner*, Exch. Mich. 1777, or Hil. 1778.—*Hugh Price* devised his estate to his wife for life, remainder to his daughter *Mary* and her heirs for ever, chargeable with £400 to his four younger daughters, within one year after the death of his wife, with interest from the death of the wife. Two of the younger sisters died in the life of the mother unmarried, the eldest daughter also died in the life of the mother, so that she was never possessed of the remainder in fee of the estate, but it descended to her only son, and it was held in the Exchequer, that the legacies to the younger daughters were vested interests, transmissible to the representatives of the deceased daughters.

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it is now too late to overturn the rule.—In that case the charge was not intended to operate upon the estate tail of the son, but upon the reversion. There is another case which is always attempted to be reasoned away, *The Earl of Rivers v. The Earl of Derby*, 2 Vern. 72. That case stood upon its own bottom, and it was equally a gift of the £10,000 to the daughter, as of the fund of the estate to the remainder-man. The case of *Buckley v. Stanlake*, (mentioned in *King v. Withers*, For. 119.) is also to the same point; there the legatees died before the daughter, and in the life-time of the wife, yet their representatives took the legacies. That case, exclusive of the circumstance of the wife's devise to perform the husband's will, is exactly in point. *Jackson v. Ferrand*, 2 Vern. 424, applies to this point.—It was a case where, if ever, the rule with respect to portions ought to have taken place—There is one rule which will apply to and reconcile all the cases, but there the heir was so little favoured that the estate was exhausted. The case of *Butler v. Duncomb*, 2 Vern. 760, also applies very particularly, the Court in that case raising the money by consent, shews they thought it would be raisable at the death of the mother. The next case I cite is *Brown v. Berkley*, 1 Eq. Ab. 340. I mention it only for the sake of its being there said, that the portion was certainly raisable, though not at that time, *Hodgson v. Rawson*, 1 Ves. 44, was after *Hutchins v. Foy*, Com. Rep. 716, and determined with reference to it. The postponement of the payment for a year was only to give time to raise the money. The time of marriage or death of the wife, in this case does not make it a portion. It is equally a gift of this part of the reversion to the daughter, as of the other part to the devisee. I am aware that there are many cases, such as *Paulet v. Paulet*, 1 Vern. 204. 321.—2 Vern. 366.—*Smith v. Smith*, 2 Vern. 92.—*Bruen v. Bruen*, 2 Vern. 439.—*Carter v. Bletsoe*, 2 Vern. 617.—*Tourney v. Tourney*, Pr. Ch. 290.—*Hall v. Terry*, 1 Atk. 502. that cannot be reconciled with the other cases I have now cited, or with *Lowther v. Condon*, 2 Atk. 127 (a).

Decree for Plaintiff.

(a) As to the vesting of legacies, vide *Killet v. Dawson*, ante, 119, of portions, *Woodcock v. Duke of Dorset*, post, vol. iii. 569.

In Court, Easter,
 1779. Lincoln's-
 Inn Hall, 18th
 March.

LEE v. ALSTON.

In case of lands
 exchanged under
 inclosing acts
 tenants for life,
 impeachable for

waste, cannot cut timber for inclosures, but must raise the money for the inclosure by mortgage under the powers in the act.—Estovers from one estate not applicable to the exigencies of another.

SIR Thomas Alston devised the premises upon which the timber in question was cut down, to Sir Rowland Alston, for life, impeachable for waste, with a contingent remainder to his issue,

with

with remainder to Mrs. *Margaret Lee* the plaintiff, in fee; Sir *Rowland Alston* being in possession, an act passed for an inclosure, which empowered the commissioners to make allotments, and gave persons, having lands within the limits of the inclosure, permission to make exchanges, and provided that, where by the means of exchanges, the allotments should pass into other hands than those of the old proprietors, these should have power to go upon the land, and cut down the timber, and that tenants for life might charge the allotments to the amount of 40s. *per acre*, to be paid to the commissioners for the expences of inclosing.—An award was made, in which were some irregularities, but not such as were material to the cause. Some parts of the land, in which Sir *Rowland Alston* was tenant for life, were given, and other lands taken, in exchange in the allotment of lands, and, in order to effect the inclosure, he cut timber, instead of borrowing money on mortgage by virtue of the power; upon which the plaintiff filed this bill, for an account of the timber cut down.

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Mr. *Selwyn* for the defendant,—contended this bill would not lie: that this Court had a jurisdiction with respect to an injunction, but that calling for an account alone, was not sufficient to transfer the jurisdiction from a court of law to this Court. The defendant having admitted the several quantities and values to be as set forth in the plaintiff's bill, trover might have been brought for the timber, as it is stated by the gentlemen on the other side, that the moment it was severed, it was the property of the remainder-man. He cited *March v. Lister*, in 1777.

Mr. *Attorney-General* in reply, cited *Bewick v. Whitfield*, 3 P. W. 267, where the very objection that trover would lie was over-ruled, and it was held proper in equity. The party must come here for an account which will draw to it relief. In *Udall v. Udall*, Aleyn, 81, and in *Cotton's case*, (*Garth v. Cotton*, 3 Atk. 751. 1 Ves. 524. 546.) it was laid down, that timber fallen by a storm would be the property of the remainder-man, but the tenant for life would have a right equivalent to his estovers. The act of parliament has not varied the right of parties, Sir *Rowland Alston* was not empowered by it to cut down the timber, which is the property of the remainder-man, and therefore he must account for the timber he has felled.

Lord Chancellor.—Is there any case, where the Court has disposed of the timber without the consent of the parties? Undoubtedly, if the case required nothing but a discovery, it should not come here, but, on the discovery had, they should proceed at law; but where an account is necessary it carries relief with it. Where the bill relates to the cutting of timber, it has always been laid down that the plaintiff has a right to the account. Here it is stated

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in the bill, that trees were cut down, and the number and value are set out, and the answer admits all that as charged; the answer gives a full discovery, therefore if the decree must obtain in this case, wherever a tree is cut down it will draw an account, and the plaintiff will charge in general, that the defendant cut down trees. It is an extreme hardship that the parties should be put to such expence, where there is a clear legal remedy. There is no equity, unless it be made so by being matter of account. I am extremely reluctant to go into it, where the party, at the time the answer came in, had a clear remedy at law. Cutting timber by the tenant for life, impeachable of waste, is not justifiable to defray an expence, which might be paid in any other way. The act of parliament is short in only giving the timber to the proprietor, because it has not determined who shall have it by the name of the proprietor. The remainder-man is not so till it is felled, and the tenant for life has a right to the shade and to estovers; on the other hand it would be going a great way to say that this act had made the tenant for life proprietor, and given him an absolute property in the timber.

The cause stood over, and now *Lord Chancellor* pronounced judgment, after first stating the case.

*Lord Chancellor.*—Sir *Rowland Alston* sets up three defences; first, that he had a right to cut the timber; secondly, that he could charge to the amount of 40s. an acre; that instead of so doing he has applied the timber, as far as it would go, and only charged for the remainder; thirdly, that the former tenant for life left the estate in a ruinous condition, and that he has applied the timber to repair, as the law allows. The first defence is not at all made out;—as to the second, the tenant for life has not a right to charge the estate with 40s. an acre, but the money is to be paid to third persons, to be applied to the extent of 40s. an acre; thirdly, the tenant for life has not a right to apply the timber, but to charge by way of mortgage. It makes a great difference to the reversioner, whether the tenant for life charges by way of mortgage, where he is obliged to keep down the interest, or cuts down the timber, which would be of value to him when he comes to the estate, and so it does to the tenant for life, who if he can cut down the timber pays nothing. It is a clear proposition, that where there is a tenant for life and a reversioner, timber fallen by storm or accident is the property of the reversioner. The consequence of this opinion is, that the plaintiff is entitled to an account, and the Master must be directed to apply the account to the timber felled on the respective estates. It is not yet ripe to enter upon the point, whether *A.* tenant for life, with remainder to *B.* in four or five distinct estates, unconnected with each other, can take botes from one estate to apply to the exigencies of the other.—There are old cases, upon customary estates, that he cannot; though I do

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do not know whether there are any cases upon the common law. It is the nature of estovers that they are to be taken without assignment,—that they take their description as good or otherwise, from their application,—that they are of utility to the estate itself.—In all these views the estovers of one estate, cannot be applied to the others. If one is possessed of black-acre and green acre, and black acre produces no estovers, if those of green acre are to be applied to black acre, the estate must be exhausted. Therefore, the account must be of the timber felled on the estates, according to their respective descriptions with original parcels, or given or taken in exchange, and as to the times when cut, for there was no right to cut after the exchange, also what parts of the timber have been applied, and to what estates, which will raise the point. Further directions to be reserved 'till after the account (*f*).

(*f*) Vide post, vol. iii. 37, the *Lord Chancellor's* order upon the Master's report, that the money be paid to the plaintiff, but without costs (*a*).

(*a*) Vide also the cases cited in the Editor's note.

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v.  
ALSTON.

### PICKERING v. VOWLES.

*Lord Chancellor* gave judgment.

Lincoln's-Inn  
Hall, 19th March,  
1783.

THE plaintiff founds his claim upon a bond given by *John* his father, previous to his marriage with *Ann* his mother, in the penalty of £400, to trustees, conditioned to be void if he should assign to them, or to other persons to be nominated by *Ann*, a leasehold estate for the term of ninety-nine years, or such term as he should have therein, for three lives, of which *Ann's* should be one, to the use of himself for life, remainder to *Ann* for life, remainder to the issue of the marriage. *Ann* died under coverture, leaving the plaintiff and another child. The estate was conveyed to the lives of *John*, *Ann*, and another life. In 1776 *John* died, having made his will, and thereby given to *Henry*, his issue by a second wife, all the rest and residue of his estate. It does not appear how many renewals of the estate had taken place, or for what lives, but that *John* being the last original life, they were all exhausted in 1776. For the executors of the husband and *Martha* the second wife, it was contended, that all the original lives falling in 1776, there was no obligation on the father, or his estate, to renew, and that the expence of the renewal having been his, it should be for his benefit. On the contrary, it was argued for the plaintiff, that this bond was purely a contract for a marriage settlement, and that the usual mode of executing it, would be to insert a covenant to renew to the same uses, the object of the parties being to give as large an interest

Where tenant  
right estate, set-  
tled upon mar-  
riage is renewed,  
the renewal is to  
the uses of the  
settlement.

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interest to the children as to the parents. For this was cited *Lawrence v. Maggs* (a), before Lord Northington, 26th Nov. 1759, that the usual form of the covenant being to keep the lease fully estated, the settlement must be so executed. In that case the party had, while solvent, frequently renewed the lease, and conveyed it to the uses of the settlement, the creditors insisted that the lease was part of his assets, and that the conveyances were fraudulent. But the Court thought that having conveyed according to the settlement, it was not fraudulent, but the settlement must be carried into execution. There is no other case applicable to the present, nor do I know of any principle that applies. The next question is, whether the father, having renewed, shall be considered as having so done for the benefit of the settlement, or for his own benefit. He did not, by the marriage settlement, or by any subsequent act, express any intent to do it for the benefit of the settlement, and by his will he has given it, by sufficiently express words, to his son. If a man has estates of his own, and also has pure trusts, and gives the residue by will, only his own estates will pass by the residuary clause, but if he has an interest as well as a trust, the clause will pass both. But this is the case of a tenant right, as it is called, and which, though an improper, is become a technical term. In the West, many estates derive their value from renewals. The crown also has many estates of the same nature.—It has long been held, that where a trustee or an executor renews such an estate, it shall be for the use of the *cestui que trust*.—The right of renewal has obtained the name of a tenant right. The rule has obtained with respect to a tenant for life, who has the opportunity of renewal from being in possession, that he shall not obtain the reversion for his own use only. The Court has therefore obliged him to stand seised as a trustee to the uses of the settlement; that was determined in *Raw v. Chichester*\*, before Lord Bathurst. This is that

S. C.

Amb. 715.

2 Dick. 480.

\* *Raw v. Chichester*, April 30, 1778, Richard Raw seised of real estates, and possessed among other things, of a lease of lands and houses in *Suffolk*, originally granted by Ch. 2, in right of the Duchy of *Cornwall*, for 31 years, renewable from time to time, upon petition by the tenant in possession, for a further number of years to fill up the term of 31 years, made his will 20th December, 1761, and reciting his being possessed of leasehold estates at *Lambeth*, and of several estates in land in *Cornwall*, for unexpired terms of years, gave and devised the said several leases to his wife, for as many years of the term as she should live, and after her decease, (if the terms should be then in being), he devises them to *William Raw* for life, and after his decease, among such of the children of *William Raw*, as should be then living, and made his wife executrix, and residuary legatee.—The testator had renewed this lease just before his decease, and the widow during her life renewed several times, stating herself as widow and executrix of *Richard*

(a) This case has been since reported, 1 Eden, 453. the judgment from Lord Northington's own hand-writing. The above statement is totally incorrect. There was no covenant to keep the lease estated: but the tenant for

life having renewed twice, once by putting in his own life, and again by putting in that of his wife, was held a creditor upon the estate for the fine and the expences of the second renewal.

that case, for, though *John* was the author of the settlement, it was intended that the lease should be fully estated, and that he and she should have life estates, and, that so fully estated it should go to the children. The renewal therefore must be to that purpose. The son therefore is entitled to the estate, paying the expence of the renewal. I can only direct an account to be taken of the renewals, and at whose expence they have been, in order to regulate what part should be paid by the tenant for life, and what by the remainder-man, and must reserve further directions and costs.† (a)

1783.

PICKERING  
v.  
VOWLES.

*Richard Raw*, and continued in possession till her death, 1761, upon the 18th of August, in which year she made her will, and disposed of these leases as her own property. The question was whether these renewed leases were the property of *Richard Raw*, and to go according to the limitations of his will, or were the absolute property of *Francess* the widow. Lord Bathurst thought she renewed as executrix, subject to the trusts in the will of *Richard*, and that the plaintiffs had a right to the renewed leases, repaying to the widow's estate the sum she had paid for the fine, deducting the value of her chance in the renewed lease.

† The case of *Owen v. Williams*, 7th December, 1773, (g) having been decided upon the same principle with the present, the Reporter has added the state of it. *William Williams* devised leasehold estates to Sir *W. Burnaby* in trust to renew the same, then to his wife for life, remainder to his brother *John Williams* for life, remainder to *Bennet Williams*, son of *John*, and the heirs of his body, and made his wife executrix. Seven years of the lease being to come, Lord Grosvenor petitioned for a lease of the reversion; Mrs. *Williams* discovering this, presented her petition as executrix, giving notice of it to the remainder-man, and got a report from the Surveyor-General, that she was in possession, and that the fine ought to be about £1,200 or £1,400. Lord Grosvenor got a warrant from the Treasury for a lease, but was to pay her a compensation for her right. *John* and *Bennet Williams* then presented petitions for renewal: Lord Grosvenor made several offers to Mrs. *Williams*, who communicated them to *John Williams*, but it appeared both Lord Grosvenor and Mrs. *Williams* conceived them to be for her own benefit. At length they settled the terms at £3,000. Mrs. *Williams* gave notice to *John* and *Bennet* of the probability of their agreeing, and advising them to take care of their own interests. It was contended on the part of Mrs. *Williams*, that this £3,000 was absolutely her property, and that *John* and *Bennet* had no claim upon her for any part of it. But Lord Bathurst held, that in case she had renewed, it would have been a renewal as executrix, that wherever a partial tenant renews, it is for the benefit of the whole, and therefore that the £3,000 given by Lord Grosvenor as a recompence for her not renewing, was subject to the trusts of the will. Vide Amb. 668.

(g) Amb. 734.

(a) As a tenant for life, trustee, or executor, in renewing for his own use, would be making an unconscientious benefit of the estate, in every case of a lease in trust, whatever alterations are made, it is still subject to the old trust. *Reach v. Sandford*, Sel. Ca. Ch. 61. commonly called the *Rumford* market case, *Pearson v. Shore*, 1 Atk. 480. *Holt v. Holt*, 1 Ch. Ca. 191. *Edwards v. Lewis*, 3 Atk. 538; and therefore wherever a lease is settled upon a person for life, with remainders over, and he obtains a renewal of the lease, the renewed lease will be bound by the trusts of the will or settlement. *Taster v. Marriott*, Amb. 688, cases cited above. *Killick v. Flexary*, post, vol. iv. 161. *James v. Dran*,

11 Ves. 888. 15 Ves. 236. *Randall v. Russell*, 3 Meriv. 190. *Fitzgibbon v. Seaton*, 1 Dow. 261. *Winslow v. Tighe*, 8 Ba. & Be. 196; and the Court acted upon the same principle where a lease of premises in which a partnership trade was carried on, had been renewed by one partner clandestinely. *Featherstonehaugh v. Fenwick*, 17 Ves. 248. As to the expences of renewal, &c. when the tenant for life is also a cestui que vie, vide *Adderley v. Clavering*, post, vol. ii. 659. As to the proportion in which such expences are to be borne, where the tenant for life is not cestui que vie, vide *Nightingale v. Lanson*, post, 440.

BOUVERIE.

1783.

In Court, Mich.  
1779.

Lincoln's-Inn  
Hall, 20th March,  
1783.

Bill does not lie  
against several  
tenants of a ma-  
nor for quit-rents.

(h) BOUVERIE v. PRENTICE.

**A** BILL to recover 1s. 6d. as a quit rent due to the plaintiff as lady of the manor. The bill was originally filed against several tenants, all of whom except the present defendant, had submitted.

This cause was heard Mich. 1779.

Mr. Madocks, in support of the bill, cited *Collet v. Jaques*, 1 Ch. Ca. 120.—*Cox v. Foley*, 1 Vern. 359.—*Duke of Bridgewater v. Edwards*, 4 Bro. P. C. 139. (a)

Mr. Robinson on the same side, said, the bill was filed against many to prevent multiplicity of suits, that therefore it originally being proper in this Court, the Court would send it to an issue. The *Duke of Bridgewater v. Edwards*, was dismissed, by the Court of Exchequer, as not having jurisdiction: and the order of dismissal reversed by the House of Lords, and the cause sent down again to be determined: that cause was for quit rents.

Mr. Attorney-General for defendant.—This would be a jurisdiction apparently oppressive, as being always inadequate to the object. All the cases antecedent to the stat. of Queen Anne are now to be laid aside, as, whether it is rent-seck or rent-service, they may now distrain, or they may bring debt. Nothing can embarrass the remedy but the premises being uncertain—there the remedy, in Chancery, must be admitted; that was the case in the \* *Duke of Bridgewater v. Edwards*. The remedy in replevin is much more easy and expeditious.

Lord Chancellor.—Where a number of persons claim one right in one subject, such a bill may be entertained to put an end to suits and litigation.—Here no one issue could have tried the cause between any two of the parties.

Mr. Madocks.—There was a cause in the Exchequer, the *Duke of Newcastle v. Gordon*, about six years ago.

(h) *Duke of Leeds v. The Corporation of Rudnor*, post, vol. ii. 338. 518. [and the Editor's note to it.]

\* It appears from the report of the case in Mr. Brown's Parl. Cases, that this was so.

(a) Ed. Toml. vol. vi. 368.

Mr

*Mr. Attorney-General.*—I was in that, it was for various rents from premises in *Newark*, which had been totally confounded by building.

*Lord Chancellor.*—Upon what principle two different tenants, of distinct estates, should be brought hither to hear each others rights discussed, I cannot conceive. The Court has gone great lengths in bills of this sort, and, taking the authority for granted, I cannot conceive on what ground such a suit can stand. A rent reserved in respect of certain lands in the manor, must be rent-service.

This cause stood now for judgment. The Reporter was absent, but understands that *Lord Chancellor* said,—This Court will not relieve in the case of quit-rents, where the party has a remedy at law. He cited the cases of *Collet v. Jaques*, 1 Ch. Ca. 79. *Davy v. Davy*, ib. 144. 1 Ro. Ab. 375. 378. Finch, 241. 256. *Holder v. Chambury*, 3 P. W. 256.—*Benson v. Baldwin*, 1 Atk. 598. If the terre-tenant will confound the boundaries, in order to prevent a distress, the lord will be entitled to a commission; but that not being the case here, the bill must be

*Dismissed with Costs.*

(i) MIDDLETON v. SPICER.

THIS case stood in the paper for further directions in *Easter* term, 1780. *Daniel Goodwin* seised in fee of copyhold lands, which he had contracted to sell, and also possessed of leasehold and other personal property, made his will, and thereby devised his copyholds and leaseholds to be sold, and the money arising from the sale, he bequeathed to his executors in trust, after payment of debts and legacies, to pay the residue to the Society for the Propagation of the Gospel, and gave legacies to the executors. In 1767, the testator died without issue. In 1773, three of the executors of the testator filed a bill, insisting that the devise in favour of the Gospel Society was void, and claiming the residue as undisposed of. On the 11th Nov. 1774, there was a decree, that the contract for the sale of the copyholds should be carried into execution, and the money to arise therefrom be considered as part of the personal estate, and that the devise of the leasehold estate to the charity was void; it was therefore decreed to be sold, and the next of kin, (none of whom were before the Court) were to go before the Master and prove their kindred. The leasehold was sold for £1,560. Upon an enquiry after next of kin, nobody claimed as such. And the question now was, whether upon this void devise

(i) *Walker v. Denne*, 2 Ves. jun. 170.

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v.  
PRENTICE.

In Court, *Easter*  
Term, 1780.  
Lincoln's-Inn-  
Hall, 20th March,  
1783.

A man dying possessed of leasehold property, which he orders to be sold, and the money paid to a charity, which is prevented from taking by the statute of Mortmain, the executor having a legacy, and there being no next of kin, in a trustee for the crown.

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the executors were beneficially entitled, or the crown, the *Attorney-General* being made a party to the bill, and claiming in that behalf.

Mr. *Kenyon* for the executors.—The question is how this money is to go. The surviving executors claim, and unless Mr. *Attorney* can make out a better title on the part of the crown, they must prevail.—It is not of course that whatever has no owner belongs to the king: There is no decision, in any similar case to the present, in favour of the crown. *Attorney-General v. Sandys*, 3 Ch. Rep. 19 (a).—*Burgess v. Wheate*, 1 Bl. Rep. 123 (b), are both decided against the claim of the crown.

Mr. *Attorney-General*, contra.—Why is the *Attorney-General* always made a party to bills in cases where there is no heir? On the part of the crown, I claim the undisposed part amounting to about a thousand pounds. The executors here are entitled only as trustees, a legacy is left them for their trouble. They are not intended to take beneficially. There is not much doubt that the crown is entitled by prerogative. The king is owner of every thing which has no other owner. It is so in the case of a legal intestacy, where there is no will. The grantee of the crown is entitled to administration to a bastard. Here there is a will and an executor, to whom the ecclesiastical court has granted probate. The executor is owner only of a special property to collect for the next of kin. The case of the *Attorney-General v. Sandys* is very peculiar: it is of a forfeiture for felony, and one of the harshest and most odious forfeitures. In *Burgess v. Wheate* an estate was vested in Sir *Francis Page* in trust for several persons, the last died without an heir, *Burgess* was heir *ex parte maternâ*, the estate coming *ex parte paternâ*, Lord *Mansfield* held that the trust ought to follow the rules of a legal estate. The opinions of Lord *Northington* and Sir *Thomas Clarke* went upon two points.—1st. That the only case where the lord or the king was entitled, was the defect of a tenant: where there was a feoffee there was a tenant, whether he were beneficially entitled or not; so that the principal of escheat failed. The argument was pressed by Lord *Camden*, then *Attorney-General*, that if the land escheated *propter defectum tenentis*, it would escheat when the line of the trustee failed; for the lord cannot lose his escheat, he therefore must have it on the failure of the line of the trustee, or of the *cestui que trust*; to construe this otherwise, would be to give a trustee, created by the court of equity, one of the mischiefs of uses, depriving the lord of his escheat.—This argument received no answer, though the Court would not admit his conclusion from it. Admitting this argument

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(a) This case, of which the best report is in 2 Freem. is most elabo-

rately discussed in *Burgess v. Wheate*.  
(b) S. C. 1 Eden, 177.

would



would not bear as to the present case.—The second ground in that case, was a notion that the court of equity would not grant a *subpæna* against the feoffee, for any who was not in privity with the feoffor; and therefore, that the crown not claiming in any privity, could not have a *subpæna*. That argument begs the question, that this Court will consider the trustee as having something substantial, which cannot be taken from him but by the feoffor, or somebody claiming in privity with him; whereas the Court considers the trustee only as an instrument. Against this argument, stands the course of the Court in making the *Attorney-General* a party, wherever there is no heir or representative (a). The right to personal property is nominally in the executor, but it is only to collect the property, and attended with circumstances which shew that it is for special purposes only. The position in *Salk. 37*, that the ordinary is not bound to grant administration to the grantee of the crown, but that it is done through respect, and that the property was at law, in the ordinary, and the administration taken out only in certain cases, is founded upon a loose enquiry into the common law. The ordinary never had any interest in the property.—He had jurisdiction in matters testamentary, but was always bound to account with somebody. 2 *Inst.* 398. He had such an interest as an administrator *durante minori ætate*, merely an authority, not at all resembling property. We are told the writ *de rationabili parte* was founded in the common law, to give the wife and children their shares, unaffected by the will. In *Wilkins's Anglo-Saxon Laws*, and the *Laws of the Conqueror*, the rights are clearly defined. *Nath. Bacon*, 89 \*. By *Glanv. L. 7. C. 6, 7, 8*, only the validity of the will was contestible in the Court Christian. In the latter part of *Hen. 3.* the right was perfectly fixed in the ecclesiastical court, as appears by the *Magna Charta* of *John* and *Hen. 3.* History tells us that about the latter end of *John's* reign, the church obtained fuller authority than before over wills. In the *M. C. of John*, c. 27, the administration was to be *per visum ecclesie*, the church were only supervisors, this was omitted in *Henry's* charter. The cases are so inaccurate as to take the statute of *Westminster*, as to payment of debts, as giving a right to the church; but the statute was only declaratory of the common law, which charged the residue with the debts, and the statute enforced the payment of them. The subsequent statutes only regulate the mode of distribution. No doubt the grantee of the crown, would be entitled to a *mandamus*, to compel the grant of administration. In *Hobson v. Wells*, *Aleyn*, 53, it is determined the crown may grant administration.

Mr. *Kenyon* in reply.—Mr. *Attorney's* speech proves that the delay which has been in this case, has enabled him to collect every

\* See the 36th law of the Conqueror, in Mr. *Kelham's* edition at the end of his *Norman Dictionary*, p. 58.

(a) Vide 1 *Eden*, 177. 181. 3 *Meriv.* 100.

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argument the case affords. Still the reasoning does not affect the present case. This is not an intestacy: I could add a case from *Peere Williams* (a), to shew that in an intestacy the crown has a right; but, in this case, the crown has no legal right. The argument from the statute of uses does not apply to *Burgess v. Wheate*. The ground I go upon is, that the party for whom I am has a legal right. I thought I had a right to call upon them to shew their equity, on the ground that *potior est conditio possidentis*. The executor has a right by occupancy, and the king has no stronger title. As to the *Attorney-General* being a party to bills; there are many cases in which unnecessary parties are made. From *Stamford* to *Comyns*, there is not a saying that there is any such right as this in the crown.

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*Lord Chancellor*.—I do not see how this case is distinguishable in principle from *Burgess v. Wheate*. The devise vests the legal property in the executor. If there is no executor, the Crown may grant Letters Patent to take out administration. The question results, whether the executor, being appointed only as a trustee, can claim as highly as an occupant at common law. Where there is a trustee, the general rule of the Court is, that he can have no other title.—Mr. *Kenyon* contends,—that the executor, being cloathed with a legal title, has a right to hold the property. *Burgess v. Wheate*, was determined upon divided opinions, and opinions which continue to be divided, of very learned men (b). The argument of the defect of a tenant seems to be a scanty one. Whether that case is such an one as binds only when it occurs *speciatim*, or affords a general principle, is a nice question. Thus much is decided, that in the case of a trustee who has merely an office, the Court has been of opinion that the same claim which would have been competent if it had been at common law, is not competent for such a trustee. Here, the executor has a common law right.—The Crown would have had a right had there been no executor.—This case I think is obnoxious to every principle that can be drawn from *Burgess v. Wheate*. The legal estate in the trustee must remain in him, unless there is a claim against him which affects his conscience. If, beyond the general title, there must be a privity with the testator; the Crown has no such privity. If the trustee ought to hold it for every person who would have

(a) Alluding probably to the case of *Jones v. Goodchild*, 3 P. W. 32, where the following curious quære is subjoined of the Reporter: A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate;—what shall become of the lease? shall it go to the administrators of the bastard, or to

the crown, or does the limitation to the heirs make any difference, or is it *casus omissus* out of the statute of frauds? and so remains liable to occupancy at common law, or lastly, is the lessor entitled, the lease being determined?

(b) See the note at the end of the case, 1 Eden, 259.

been entitled if it were at law, then he should hold it for the Crown, as well as any other person.

The cause stood over, and now came before the Court for judgment. The reporter was absent, but has been favoured with the following note :

*Lord Chancellor.*—It would be mere pedantry to run over all the cases to be met with on this subject, which are collected, and fully stated in *Burgess v. Wheate*. This not a case in which the assets can be marshalled, which is never done unless to make a debt of an inferior nature payable. Lord Mansfield did not assent to the argument of the Master of the Rolls, in *Burgess v. Wheate*, respecting an escheat, but no such question arises in the present case.—Here the executors, having legacies bequeathed, and being clearly trustees, cannot *by any possibility* take any beneficial interest.—In *Burgess v. Wheate*, and every other case that is to be met with, the *Attorney-General* has been a party, which shews it was always the opinion that the Crown had such interest in cases of this kind, that it was necessary to make him a party.—The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown, as they would have been for any of the next of kin, if these could have been discovered.

Therefore decreed in favour of the crown, but directed all the executors expences to be paid (a).

(a) It has generally been thought, (vide particularly 2 Ves. jun. 179) that Lord Thurlow coincided in the opinion given by Lord Mansfield in *Burgess v. Wheate*, in favour of the claim of the crown; but whatever may have been his Lordship's private opinion, the determination at least, of the present case, (as the Editor has submitted in a note to *Burgess v. Wheate*, 1 Eden, 259.) does not in any degree affect the principles upon which Lord Northington and Sir Thomas Clarke founded their decision. It relates to a different subject matter, and rests on principles entirely different. The ques-

tion in the present case was one of *vacant possession*, and therefore a question of *prerogative*. In *Burgess v. Wheate* it was a question of *tenure*, the claim of the crown having been admitted on all sides to be *seignioral* and not *prerogative*. Several cases are cited in the above mentioned note applying in some degree (but none of them very closely) to the points argued in *Burgess v. Wheate*, and in the present case; the one nearest resembling the present, is *Barclay v. Russell*, 3 Ves. 424, which was a question of *vacant possession*.

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v.  
SPICER.

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In Court, *Mich.*  
1778. Lincoln's-  
Inn Hall, 24th  
March, 1783.

Devise to trustees  
to pay debts,  
then to stand  
seised to the use  
of *A.* for life,  
without impeach-  
ment of waste,  
after his decease  
to the use of the  
heirs male of his  
body, severally,  
respectively and  
in remainder, is  
an estate tail in  
*A.* (k) Where  
tenant for life  
pays off an in-  
cumbrance upon  
the estate, he  
shall be con-  
sidered as a cre-  
ditor for the mo-  
ney so paid, but  
where tenant in  
tail pays, it is in  
exoneration of  
the estate of  
which he may  
make himself ab-  
solute owner.

## JONES v. MORGAN.

**A** BILL filed by the plaintiffs *William Jones* and *Elizabeth* his wife, *Elizabeth* claiming as sister and administratrix of the late *William Morgan*, one of the sons of the late Sir *William Morgan*, to recover against the estate of the late Sir *William Morgan* the sum of £1,896 paid by the said *William Morgan*, in discharge of a debt due by bond from the said Sir *William Morgan*, to *Lock*, in exoneration of the estate of Sir *William Morgan*, and for other purposes, under the will, and circumstances following Sir *William Morgan*, by his \* will bearing date April the 3d, 1731 devised his estate to trustees, to raise money, (in aid of his personal estate) to pay his debts, and after payment of the same, the to stand seised to the use of his younger son *Edward* for life, (with the same limitations as in the subsequent devise to *William*,) and for the default of such issue, to the use of his eldest son *William* for and during his natural life, without impeachment of waste, and from and after his decease, to the use and behoof of the heirs male of the body of his son lawfully begotten, severally, respectively and in remainder, the one after the other, as they, and every of them shall be in seniority of age and priority of birth, with remainder over to *Thomas Morgan*, in the manner after stated, &c. To *Edward* and *William* powers were given, whilst in possession, of leasing, making jointures for wives, and raising portions for younger children. In the devise over to his brother, the limitations were thus expressed: To *Thomas* the brother for life, without impeachment of waste, remainder to *Thomas* the younger his son, remainder to the first son of *Thomas* the younger, and the heirs male of such first son, remainder to the second son, and so on to the tenth son, and all and every other son and sons, severally successively and in remainder, the one after the other, according to their seniority of age and priority of birth. The testator died the 24th of the same month of April, 1731, *Edward* died in 1743 unmarried. In 1746, *William* not being then of age, a mortgage was made by the trustees of the estate, to *Savage*, to raise £20,000 for the payment of the debts, but the bond-debt to *Lock* was not among the debts discharged. The 28th of March, in that year *William* came of age, and upon the 29th of April, he took up the bond to *Lock*, which with the interest due upon it amounted to £1,896, and gave his own bond for that sum; from that time to 1761, he paid the interest to *Lock*, and also the interest of the mortgage for £20,000, and this latter he continued to pay till his

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(k) *Countess of Shrewsbury v. Earl of Shrewsbury*, post, vol. iii. 120. S. P.

\* This will is printed at length in 7 Bro. P. C. 136 (a) the material parts only are therefore cited here.

(a) Ed. Toml. vol. iii. 322, and in the Appendix to *Fearne's C. R.*

death

death. In 1761, he paid off his own bond to *Lock*, but preserved both the bonds uncanceled till his death in 1763, when, he dying intestate, Mrs. *Jones*, his sister administered to him. Upon the death of *William Morgan*, *Thomas Morgan* the elder, (remainderman in the will of Sir *William*) entered into possession. He died in 1769, and was succeeded by his son *Thomas* the younger, who dying in 1771, *Charles Morgan* his brother, the present defendant, came into possession. In 1776, Mrs. *Jones* filed this bill against *Charles Morgan*, insisting that her brother *William* was only tenant for life of the estate, and consequently, that she, as his representative, was entitled to the money which he had paid in discharge of the bond, and exoneration of the estate; or that, even taking him to be tenant in tail, he had shewn that he meant to keep the bond as a subsisting charge upon the estate, and not to discharge the same for the benefit thereof.

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 JONES
 v.
 MORGAN.

This case was argued in *Michaelmas Term*, 1778.

Mr. *Mansfield* for the plaintiffs.—The bond being paid off by *William Morgan* was an exoneration of the estate. The claim made by Mrs. *Morgan* is as administratrix of her brother *William*, to be paid the principal and interest of the bond, the whole profits of the real estate being exhausted by the interest of the £20,000, and a further claim for costs of suit, and for so much as *William* paid for interest of the £20,000, as was above the rents and profits of the estate. In the answer, it is insisted that *William* was tenant in tail, and therefore, he having paid off the bond, it is no charge upon the estate. But there is no ground to say he took more than an estate for life. The words are expressly for life, without impeachment of waste, and then, after his decease, to the heirs male, severally, respectively and in remainder. The testator meant to exclude words of limitation. In the other part of the will the words “severally, successively and in remainder,” are words of precisely the same import. The testator gives him powers proper to accompany an estate for life. To be sure heirs male are words of limitation, unless there is an intent to make them words of purchase, but where there is such intent they must be so construed.—*Lisle v. Gray*, 2 Lev. 223. and *Lowe v. Davies*, 2 Ld. Raym. 1561, are cases at law, where they have been construed words of purchase.

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Lord Chancellor.—I did not hear you state any words of limitation afterwards.

Mr. *Mansfield*.—No.—There are other cases where, upon the ground of intention, they have been held words of purchase. As, *Bagshaw v. Spencer*, 1 Ves. 142.—2 Atk. 246. 570. 577. This case,

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case, as well as that, is upon a trust estate, the legal estate is in the trustees, that case turned upon this distinction.

Lord Chancellor.—It turned, did it not, upon the distinction between trusts executed and trusts executory?

Mr. Mansfield.—That distinction was exploded in *Bagshaw v. Spencer*; the present case is undistinguishable from that. Here, as in that case, is an estate in fee in the trustees, to sell for the payment of debts, therefore *William Morgan* took an equitable estate. Then *Bagshaw v. Spencer* decided, that the words *heirs of the body* may be words of purchase, and that if the intent be so, the construction shall also be such, although he has used words which are in general words of limitation. The words here are as satisfactory to shew the intent, as those in *Bagshaw v. Spencer*, and then that case is a full authority. The powers of leasing, jointuring, and raising portions, strongly corroborate this construction. And if this be the construction, *Mrs. Jones* is entitled to a satisfaction for the money paid. When this case was before *Lord Mansfield*, and in the House of Lords, this (though not the point immediately in question) was treated as an estate for life, and that he had given estates for life, wherever he could.

Lord Chancellor.—The consequence would be that there never would be an estate tail in a will.

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Mr. Madocks on the same side.—When a tenant for life pays off an incumbrance, he shall stand in the place of the creditor, whether he does or does not take an assignment of the security.—In a case at the Rolls about ten years ago, where the tenant for life paid marriage portions, and only took a receipt for them, without any assignment, upon a bill filed by his personal representative it was held he should stand as a creditor for the sums paid. Secondly, *William Morgan* was only a tenant for life, in this Court. This is decided by *Bagshaw v. Spencer*, to be a trust estate. The distinction between a trust executed, and a trust executory is only in the form. In *trust to convey to A.* is executory, in *trust for A.* is executed; but wherever the *cestui que trust* is so situated that he can call for the execution of the trust, he is held in this Court to be in possession.

Lord Chancellor.—There never was any doubt but that a trust executed was, in this Court, equivalent to an use at law.

Mr. Madocks.—The whole legal estate is in the trustees, in order that they may sell, which they cannot do unless they have the fee. The consequence of this is, that *Morgan's* is a trust-estate. Then we contend that *Morgan* was tenant for life. The construction

construction of trust estates depends upon the intent of the testator regulated by certain rules. The rule in *Shelley's* case is a rule of a court of law,—not to be laid aside on the other side of the Hall; but this Court will lay aside the rule when it is against equity and good conscience.—Evidence of the testator's intent will prevail against the rule.—Infallible evidence that the testator intended the first taker should take for life only, will prevail against the rule. Then the question is, whether here are such circumstances as to shew the testator's intention. The evidence here is infallible, independant of the devise being expressly for life, which is clear to shew the intent; the next circumstance is, that it is without impeachment of waste, which was relied upon in *Bagshaw v. Spencer*. The words shew the heirs were to take by purchase, in remainder; the expression is as strong as if he had said *by purchase*. We must understand the terms in their legal meaning:—then what is the sense? that the heir takes not by descent, but by purchase, and then the father cannot take an estate tail. The powers granted are always held concurrent evidence of the testator's intention,

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Mr. *Attorney-General* for the defendants.—If *William Morgan* took an estate tail, the plaintiff does not insist upon any claim to the money paid by him to clear his own estate. The question upon the nature of the estate puts an end to every other kind of question. And this is not very difficult, after the number of cases determined upon it. The words are, “for life, without impeachment of waste,” but these are followed by other words. The powers are applied to all the takers. Certainly the testator, when giving an estate for life, with limitations over, did not mean them to be defeated immediately; that therefore has weighed very much: but the question has been, whether the rule of law could be overturned, and these words construed to be words of purchase. In *Lisle v. Gray*, the estates were limited to four sons, and then came the general words, “and to all and every, &c.” the question was whether the words should be taken as words of reference to the former words, or as independant of them; the Court said they were words of relation, and were to be construed *eodem modo*. *Lowe v. Davies*, was a case of the same kind, but the words there were express, (that is to say) the first and other sons, &c. In this case there is no such limitation to the first, &c. sons, to which the words *severally, successively and in remainder*, can refer. The words mean no more than in a course of descent, and have no other meaning than is imported by the estate tail, by operation of law. This is so perfectly settled, that it is unnecessary to cite the cases of *Colson v. Colson*, 2 Str. 1125, and 2 Atk. 246, and *Langley v. Baldwin*, 1 Eq. Ab. 185, which book is erroneous in stating it to be for life, as the opinion was that it was an estate tail, (see the case as cited by P. W. 59, and also p. 759, in the case of *Attorney-General v. Sutton*, and 8 Vi. 253. pl. 16.) and *Shaw v. Weigh*, (1 Eq. Ab,

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Ab. 185. 8 Vi. 257. pl. 25, 26.) with respect to the powers.—In that case, the intent was clear as far as the sixth son, that they should take as purchasers. In *Roe*, dem. *Dodson v. Grew*, 2 Wils. 322, there was a very satisfactory opinion that the devisee took an estate tail. The authorities in this Court are equally strong. The rule with respect to what estate is given, is the same here as at law. In *Garth v. Baldwin*, 2 Ves. 646, it was determined that the construction is to be the same here, as at law: and the case of * *Sayer v. Masterman*, before the commissioners in 1757, was equally strong: there, notwithstanding all the circumstances, the commissioners thought it an estate tail. † In *King v. Burchell*, the devise was to *J. H.* for life, then to his heir male, (in the singular number) Lord *Henley* thought he took an estate tail. In ‡ *Wright v. Pearson*, the decision was the same. It is best to go by the same rule in both courts, and that this Court should hold all trust estates to be under the same rules as legal estates. In executory trusts, in certain cases, the Court may take a greater latitude, but not in construing trust estates. If this point be with us, the whole question is at an end.

Lord Chancellor.—Either point goes to the dismissal of the bill. First, That he was tenant in tail, and obliged to pay the charge.

* That was,—*Sayer*, seised in fee of lands in the counties of *York* and *Durham*, by will duly executed, devised the lands in the county of *York*, (after the death of his wife) to his brother *E. S.* for life, with power of jointuring; and after his decease to such child or children as should be lawfully begotten by him, the males to be preferred before the females, and to succeed according to their births, and in trust to preserve contingent remainders during the life of *E. S.* to *D. R.* and, after the decease of his said brother or failure of issue as aforesaid, to his brother *G. S.* and the heirs of his body, the males having the preference as aforesaid, and succeeding according to their births; and to preserve contingent remainders, he gave the same to the said *D. R.* and on failure of issue of *G. S.* to his niece *M. C.* and the heirs of her body, remainder to his right heirs.—And as to his estate in *Durham*, to his brother *G. S.* for life, and to the heirs of his body, (with preference to males, and according to births,) and to preserve contingent remainders, to *D. R.* remainder to *E. S.* and the heirs of his body; with powers to make jointures, and leases to *G.* and *E.* respectively; remainder to preserve contingent remainders to *D. R.* remainder to *M. C.* *ut supra*, remainder to his right heirs.—*E. S.* died without issue, *D. R.* and *M. C.* being also dead without issue, *G. S.* articted for the sale of the estate included in the first devise, and upon bill filed for specific performance, held that *G. S.* took an estate tail.

† *King v. Burchell*, before Lord *Henley*, 1759, testator devised to *J. H.* for life, then to the heir male of *J. H.* and his heirs, and for want of such issue then over; *J. H.* took an estate tail, (cited 2 Bur. 1103, where it is said an appeal was brought but deserted.) *Fearne*, on C. R. 124.

‡ *Wright v. Pearson*, 16th June, 1758, devised to trustees to raise £500, remainder to *T. R.* for life, remainder to trustees to preserve, &c. remainder to heirs male of the body of *T. R.* and their heirs, and for default of issue male of *T. R.* remainder over, held an estate tail in *T. R.* (a)

(a) These three cases are all reported, though very imperfectly, in *Amb.* and there is a very correct report of the former, in *Wilmot's Opinions*

and *Judgments*, p. 368, of the two latter from Lord *Northington's* own handwriting, 1 *Eden*, 424. and *ib.* 119.

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Second, That if he was tenant for life, in these circumstances, the money ought not to be repaid.

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Mr. *Ambler* on the same side.—A tenant for life may pay off a charge, without his representative being entitled to be repaid. Lord *Hardwicke*'s rule was to give an estate tail wherever the words would admit of it, unless there were words to shew a plain intent to the contrary, as in *Bagshaw v. Spencer*. This appears by *Garth v. Baldwin*; and *Wright v. Pearson* (m) is very strong, as being a case where there were trustees to preserve contingent remainders.—It was to the heirs of the body, and their heirs; Lord *Hardwicke*, in *Garth v. Baldwin*, held that the first taker took an estate tail. Suppose *William Morgan* to have been only tenant for life, it would be very extraordinary after such a length of time, to let in the representative.—The estate must now be considered as having discharged the burthen.

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Lord *Chancellor*.—It is very possible that, if he was tenant for life, the charge may have been paid off. The first point is, whether the interest was kept down by the rents and profits, or the rents applied to other purposes.—If you insist upon this point, it must go to the Master. I am ready, if you give up that point, to decide upon the other. Then how do you argue, that if *William Morgan* was tenant for life, he intended to pay off the debt?

Mr. *Ambler*.—To exonerate the estate which would probably go to his children. He borrowed upon his own estate money to pay off the bond, and never made any application for the money, or declaration that he did not mean to pay it out of his own pocket.

Lord *Chancellor*.—Is not the rule, that if tenant for life pays the debt, he becomes *primâ facie* entitled to be repaid, unless you shew he meant otherwise?

Mr. *Selwyn* on the same side.—If he was tenant for life only, the case calls for circumstances to shew that he did not mean to charge the estate. The first question is upon the limitation.—It arises upon a will under which all the parties are volunteers. If the question were upon marriage articles, I admit the words would give an estate for life only, but here they are volunteers, which is a different consideration. I admit two different rules; first, that trusts are to be construed here by the same rules that legal estates are at law; secondly, that the intent of the testator, in order to prevail, must be agreeable to the rules of law.

(m) Reported in Amb. 360. The Reporter observes that this decision was dissatisfactory to the bar, and appealed from to the House of Lords, but, before the hearing, compromised, ib. 363.

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Lord Chancellor.—Is the first rule so? I think your difficulty is to get rid of *Bagshaw v. Spencer*, where it was held that trusts were not like legal estates.

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Mr. Selwyn.—In *Watts v. Ball*, 1 P. W. 108, and *Bale v. Coleman*, 1 P. W. 142, it is laid down that trusts are to be construed by the same rules as legal estates, Secondly, the intent of the testator in order to prevail, must be consistent with the rules of law. The rule of law which applies to this case, is the rule laid down in *Shelley's* case, and in Co. Lit. that where the estate is given to the ancestor, and is also given in any part of the same instrument to the heir, or heirs of the body, the estates unite. The cases of *Lowe v. Davies*, and of *Lisle v. Gray*, are the only ones that have been cited on the other side, but they are very distinguishable from this: in both those cases the devises were to the 1st, 2d, 3d, and 4th sons *nominatim* and distinctly. In *Bagshaw v. Spencer*, there was a limitation to trustees to preserve contingent remainders, which makes an essential distinction from this case. There are many cases where it has been determined an estate tail passed, notwithstanding the words *without impeachment of waste*, *Langley v. Baldwin*, (cited) 1 P. W. 759. So too, where the words are *severally* and *successively*, *Legate v. Sewell*, 1 P. W. 87, where it was determined to be an estate tail, notwithstanding those words and words of limitation. So notwithstanding a power of jointuring, *Broughton v. Langley*, 2 Salk. 679, and also of leasing, for tenant in tail cannot, by the statute, make a lease that will bind the remainder-man, which he may under the power. *Bale v. Coleman*, shews this.—Heirs of the body, in their legal sense, are words of limitation, not words of purchase. Their fixed known construction being so, the Court will not, from guesses at the intention of the testator, change them to words of purchase, *Goodright v. Pullyn*, 2 Lord Raym. 1437. *Garth v. Baldwin*, *Sayer v. Masterman*.—The long acquiescence before the filing of the bill, may have prevented evidence appearing of the intention of *William Morgan*, even if he was only tenant for life.

Mr. Kenyon on the same side.—Admitting the rule that where tenant for life pays off a charge, he continues the creditor, unless he intend to discharge the debt: *William Morgan* paid off all the other debts of his father, and pledged estates for them, of which he was seised in fee.—The other question is attended with more cases than almost any case in the law. It is deduced from *Shelley's* case, and the judge who reported *Shelley's* case inserted it, as his opinion, in his commentary on *Littleton*, and makes a distinction between a freehold, and terms for years. The rule is maintained in *Duncomb v. Duncomb*, 3 Lev. 437. *Colson v. Colson*,
and

and *Sayer v. Masterman*, and other cases collected by Mr. *Fearne* (in his *Essay on Contingent Remainders*) with great accuracy and ability. *Perrin v. Blake*, in the Exchequer Chamber, established the rule. So in the case from *Robinson's Gavelkind*, and in *Trollop v. Trollop*, both cited *Fearne*, 140, the Common Pleas held the words *heir male*, to give an estate tail. *Wright v. Pearson*, and *King v. Burchell*, come up to this. *Wright v. Pearson*, was this: *Henry Rayney* devised the estate, subject to a charge, to *T. Ramey* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *T. Ramey*, and their heirs. The cases cited on the other side, do not break in upon this rule. In *Robinson v. Robinson*, (2 Ves. 225.) the words were "for life, and no longer," the House of Lords rejected the words, *and no longer*, and gave a greater estate. 5 Bro. P. C. 278, S. C. So also in *Roe*, dem. *Dodson v. Grew*. In other parts of the will, he has interposed trustees to preserve contingent remainders. Then *Bagshaw v. Spencer* is said to be decisive upon the subject. The case of *Garth v. Baldwin*, in 2 Ves. came afterwards before Lord *Hardwicke*; what he set out with there made him hesitate whether all he had laid down was consistent with *Bagshaw v. Spencer*. The party there as clearly meant to give an estate for life, as in *Bagshaw v. Spencer*. Lord *Hardwicke* laid it down that the construction in trusts should be the same as in limitations of legal estates, unless there was a clear intent to the contrary. Lord *Hardwicke* determined *Bagshaw v. Spencer*, on the ground of there being trustees to preserve contingent remainders. In several other cases it has been held that trusts are now what uses were before the statute. In *Lord Glenorchy v. Bosville*, For. 3, Lord *Talbot* took the distinction between the rules of construction of courts of law, and equity.—That rule was followed by Lord *Hardwicke* in *Garth v. Baldwin*. The case of the *Attorney-General v. Sutton*, 1 P. W. and now more fully, 2 Bro. P. C. 382. proceeded upon a difference between uses executed and executory, and it was there said that if the uses were executed, there would be no handle for the courts of equity to interfere. *Bale v. Coleman* was a serious opinion of Lord *Harcourt*, when considering a former opinion of Lord *Cowper's*. *Garth v. Baldwin*, at the time it was decided, was considered as overturning *Bagshaw v. Spencer*.

Mr. *Mansfield* in reply.—*Bagshaw v. Spencer*, appearing never to have been over-ruled, seemed to me to be decisive. The general position as laid down by Mr. *Attorney-General*, and some of the other gentlemen is, that where in the same instrument there is an estate given to the ancestor, and to the heirs male, it shall be an estate tail in the ancestor. Mr. *Selwyn* moderates the rule to this, that the words shall not be defeated by uncertain words
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to shew an intent. I contend that of course, the legal import may be defeated by certain words. The rule is laid down upon the construction of a deed; and that at a time when it was material to third persons, whether the person should take as a purchaser, or as heir. It is extraordinary that this rule of law should operate against the intent of the testator, when no other rule of law does,—as for instance, the rule that where an estate is given without words of limitation, the devisee shall take for life only, yet if any thing can be gathered to shew the intent, it shall convey an estate in tail, or in fee. It is true that in *Lisle v. Gray*, there are other words, but it is strange to say, that where the intent appears from other parts of the will, it shall not be the same as if the testator had used technical words. The question is said to be, whether he has shewn that he meant that the first persons to take the inheritance, should take as purchasers, and the ancestors to take for life only. Mr. *Attorney-General* and the other gentlemen have said the rule ought to be the same here as at law, but they immediately contradicted this, because they draw a distinction, and say that it is so in trusts executed, but otherwise in those which are executory. If *Bagshaw v. Spencer* be an authority, there is an end of the question, for there it was a trust executed. But it is said, that in that case there were trustees to preserve, &c. but what magic is there in those words? the only inference from them is, that they serve to shew the testator's intent. If there are other words equally strong, must not the effect be the same? Then there is a stronger ground in this case, from the words *severally, successively and in remainder*. What comes of the words *in remainder*? could the heirs take in remainder? those words must be rejected. Then, has *Bagshaw v. Spencer*, ever been shaken? It is said to be so in *Garth v. Baldwin*. In the report of *Garth v. Baldwin*, it is said, that at the time of the decision, Lord *Hardwicke* had the note of *Bagshaw v. Spencer* in his hand, and confirmed the doctrine of it, but distinguished the cases. *Garth v. Baldwin* is not to be distinguished from *Bale v. Coleman*, which Lord *Hardwicke* there affirms. Then, has any other case overturned it, or is it no authority? Mr. *Kenyon* has endeavoured to overturn it by the distinction between trusts executed and executory. The question in *Lord Glenorchy v. Bosville* is made to turn on the trust being executory. The testator directing the execution is only directing what must be done, whether he directs it or not. It is extraordinary his directing it should vary the construction. The same is the case of *Attorney-General v. Sutton*. There may be some reason perhaps for this construction in carrying marriage articles into execution, but the distinction being applied to wills is much better exploded. This is the only distinction between trusts executed and executory. If Lord *Hardwicke* did more wisely in *Bagshaw v. Spencer*, by exploding the distinction, it remains to see whether any subsequent case has destroyed *Bagshaw v. Spencer*. I find none. *Sayer v. Masterman*

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Masterman was the case of a legal estate, so was *King v. Burchell*; Lord *Henley* affirmed *Bagshaw v. Spencer*, and in *Wright v. Pearson* he treated *Bagshaw v. Spencer* as rightly determined, but said that in that case (*Wright v. Pearson*) he thought the testator's intention was to give an estate tail—he did not mean to shake what had been decided in *Bagshaw v. Spencer*.

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Lord Chancellor.—I do not see how the two can stand together (a).

Mr. Mansfield.—*Bagshaw v. Spencer* not only is not shaken, but has received the strongest confirmation from *Perrin v. Blake*. All the judges who argued there for its being an estate for life, argued upon *Bagshaw v. Spencer*, and the judges who argued on the other side considered it as an authority.

Lord Chancellor.—If the question was new in this cause, and I had only to give my ideas of equity, in analogy to the rule of law, I should have considered the case the same as if it had been at law. I think no great doubt could have been entertained about it. I take the rule in *Shelley's* case never to have been shaken at all. I take that rule to be, that where the heir takes in the character of heir, he must take in the quality of heir. I take the question always to have been, as to the import of the word *heir* in the proposed case. I never heard it contended that the testator could vary the sense of the law: whether heirs general, heirs male, or heirs female, are to take by those words, they must take in that quality; therefore you must prove that the second taker was not intended to take in that character, but in some other. In *Lowe v. Davies*, and in *Lisle v. Gray*, the testator shewed his intent that the persons should not take as heirs, but explained the words differently. In *Lisle v. Gray*, there being specific limitations to the four first sons, the judges understood the words "*and so, &c.*" to be the fifth, sixth, and other sons, and distinguished it from the general sense of the word *heirs*. But this is a trust estate, and the difficulty arises from the case of *Bagshaw v. Spencer* decided by one of the first authorities, and with this greater weight still, that from the great length of time since that decision, probably a great deal of property may depend upon the rule. I cannot say that I am satisfied with the reasons of that determination. It goes upon equity being more liberal than the law, in the construction of trusts, but I cannot conceive how equity can go upon a more liberal principle in such construction than the law does. But it is there said, it must be by implication plain. The rule of the courts of law goes further than the doctrine of trusts. The courts of law have always gone upon what a court of equity ought to do. It is

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(a) Vide *Fearne C. R.* 133. 6th edit.

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said that there is no difference between trusts executory and executed. It is very difficult to conceive that a slight difference in the words of a will should make a difference of determination, but, in marriage articles, there is something to proceed upon or to amend by. I cannot distinguish the case of *Wright v. Pearson* from the present. I know Lord *Hardwicke* did frequently state the circumstances of there being trustees to preserve contingent remainders, as varying *Bagshaw v. Spencer* from other cases before him.—I wish he had stated his reasons, I cannot see how it varied the case, except by shewing the intent of the testator to give an estate for life; other words of the same import must have the same construction. At law, I should not think the words *severally, successively and in remainder*, would make much difference. In construing informal words the argument takes up the word *remainder*, and gives it a technical sense, which it refuses to the words *heirs male*. I shall not be averse to have this cause go up to the House of Lords, if any thing material can be done; but if it is only to determine whether the insertion of trustees to preserve contingent remainders makes the difference, it will be of no use.

The cause stood over, and this day *Lord Chancellor*, after stating the case, gave judgment.

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*Lord Chancellor*.—The question is, Whether *William Morgan* the son took an estate tail or for life only? If he took an estate-tail, his paying off the charge would shew he meant to pay it in exoneration of the estate. It is a general rule of inference, that where the tenant in tail pays off a charge, without taking an assignment, he does it with that intention; but this rule is capable of being encountered by any evidence to prove the contrary. I say this upon the authority of *Kirkham v. Smith*, 1 Ves. 258, which I cite for the purpose of establishing the principle, that a tenant in tail so paying is inference only, not *juris positivi*. The case of *Amesbury v. Brown*, 1 Ves. 477, is on the same ground. *William* by giving his bond to *Lock*, took upon himself the debt of the estate, and from 1746 to 1763 paid the interest to *Lock*, and the surplus interest of the £20,000 over and above what the estate would discharge. From 1763 to 1776 *Elizabeth Jones* suffered the matter to sleep; in 1776 she filed her bill. Suppose this to have been an estate for life, as she now contends it to be, the first question will be, whether it is competent to her to come now for this money. For this purpose I cited the case from Vesey (*Kirkham v. Smith*). The question is, Whether *William Morgan* did not do sufficient acts to shew that he meant to pay off the incumbrance? A tenant for life, in general, paying off a charge, without taking an assignment, is a creditor for the sum so paid; but the smallest demonstration that he meant to pay it off will prevent his representative from coming for the money. Here he  
 paid



paid interest much beyond what the profits of the estate would have discharged, which is a demonstration, *prima facie*, that though tenant for life, he meant to discharge the estate. Though he was only tenant for life, he knew it was settled on his family, and put himself to extraordinary inconvenience to pay off this debt; and this he did for seventeen years (during all which time, as tenant for life, he might have called for a sale) in order to preserve the estate. But she contends he did this on the idea that he was tenant in tail, and in order to bring the case within that of *Kirkham v. Smith*, she says that he was persuaded that he was so by *Thomas Morgan*. Where tenant in tail pays off a charge, he is not considered as a creditor, because he may make himself absolute owner of the estate. If *William Morgun* considered himself as such, he was content with the estate tail: in such a case as this it would be extraordinary to allow the representative of a person living in this way seventeen years, to make such a claim. Thirty years passed from the time of the mortgage, to the filing of this bill; so far was it the sense of the family that he meant to discharge the incumbrance. If these presumptions were on a mistaken notion of law, it might be set right at any distance of time, but here appears to have been no such mistake. I am not satisfied, supposing this to be only a tenancy for life, that he meant to keep a lien upon the estate.—But if it turned upon that difference, my opinion is that this was an estate tail. I am aware I differ from the opinion of those I most respect now living in the profession, and from that of Lord Chief Justice *de Grey*, thrown out as to this part of the case, in the House of Lords. I am sorry the plaintiff, who does not succeed now, did not succeed there; but the House was of a different opinion, and this limitation was referred to as being an estate for life. According to my own notion, it is impossible this should be so considered. By all the cases, where the estate is so given that, after the limitation to the first taker, it is to go to every person who can claim as heir to the first taker, the word *heirs* must be words of limitation. All *heirs* taking as *heirs* must take by descent. In cases where I can bring it to the point, that the testator by the word *heirs*, as used in the will, means first, second, third, and other sons, there I change the words of the will, but here I think the word *heirs* was the very thing he meant. Suppose *William* had had a son, which son had had a son, and died leaving [Sir] *William*, the eldest son of the son would have been heir. If there had been a title he would have taken it; but the estate, if these had been words of purchase, must have gone to the second son(a), the devise

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(a) Words of purchase here, Lord *Thurlow* evidently meant in the sense of a limitation to first and other sons

of *William* successively in tail male, in which case the devise to the first son being lapsed by his death in the testator's

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devise to the first son, being a lapsed devise, like the case of ** White v. White*, lately in the House of Lords, from which it is taken. But Sir *William Morgan*, meant the estate to go to whoever should be heir. The cases have been laboriously argued, on which I (therefore) dare not call immaterial. I think the argument immaterial, that he meant the first estate to be an estate for life. I take it that, in all cases, the testator does mean so; I take it upon what he meant afterwards. If he meant that every person who should be heir should take, he then meant what the law would not suffer him to give, or the heir to take as a purchase. In conversing with a great authority, whom I will not name, I asked what would become, in the case stated, of the grandson if the answer was, he should take as heir.—I know he might; but

* *Robert Warner*, on the demise of *Richard White v. Hamilton White*, of Lords, 6th May, 1782.—By settlement 24th and 25th of September on the marriage between *Simon White*, eldest son of *Richard White*, and *Jane Eyre*, part of the lands in question were conveyed to trustees, to the use of *Simon White* for life, without impeachment of waste, remainder to the other sons of the marriage, remainder to *Simon*, in tail male, remainder to the use of *Simon* in tail male, remainder to *Richard White*, seised of these remainders, and of other lands not comprised in the settlement, and having issue the said *Simon White*, his eldest son, *Hamilton White* the defendant in error, and a daughter named *Margaret*, 1st Jan. 1775, by will, and thereby, after several devises of lands to *Richard White*, the plaintiff, and *Hamilton White* the defendant in error, gave the rest of the lands in *Bantry*, not already settled on the marriage of *Simon*, some parts which were devised to *Hamilton* for life,) to *Simon*, and the heirs of his body, remainder to *Hamilton*, and the heirs of his body, remainder to *Margaret*, in tail general, remainder to his own right heirs, and appointed executor and residuary legatee. *Simon* died 2d September, 1776, in the lifetime of his father, leaving issue by *Frances Jane Eyre*, the plaintiff in error, and three other sons, and four daughters: *Richard*, the father died 27th same September, without revoking the will. The defendant taking possession of the lands devised to him, and of the other lands not in settlement: an ejectment was brought in *B. R. in Ireland*, by the plaintiff, on the demise of his lessor, (the grandson of testator) for the recovery of the same, (except so much as was devised to *Hamilton* for life); upon the trial of the ejectment, the jury returned a special verdict, which being argued in *B. R. in Ireland*, judgment was given for the plaintiff, the defendant brought his writ of error in the *King's Bench* and in *Michaelmas Term*, 1781, the judgment of *B. R. in Ireland* was reversed. Upon this judgment of reversal, error was brought in parliament, and upon hearing in the House of Lords, the following question was put to the Lords: Whether in the event that had happened, defendant *Hamilton White* took, and what estate in the lands of *Bantry*, under the devise to him for the life of *Simon White*? The Lord Chief Baron delivered their unanimous opinion, that *Hamilton* took an estate tail, and the judgment of the Court of *Bench* in *England*, reversing that of the *King's Bench* in *Ireland*, was affirmed. The determination of this case went very much upon that of *Hodgson v. Ambrose*, *B. R. Easter*, 1780, (reported by Mr. *Douglas*, p. 34) which was affirmed in the House of Lords.

testator's life-time, that to the second son must have taken place in exclusion of the issue male of the first son, according to the case referred to. I have here stated the Chancellor as speaking of the death of a first son of *William*, in the life-time of Sir *William* the tes-

tator, which doubtless must have been the intended expression; the printed report referred to as the time of *William* (who was the testator) instead of Sir *William*, (the testator.) (Note by Mr. *C. R.* 194, 6th edit.)

he must take by descent. All possible *heirs* must take as *heirs*, and not as purchasers. Many cases have been determined on the ground of a devise to the first taker, with remainder to the heir male, in the singular, or heirs male in the plural, as in *King v. Burchell*, (before Lord *Henley*) where it was in the singular number. The rule in *Shelley's* case, was used as a demonstration that it was indifferent, whether the limitation was in the singular, or plural number, it was equally an estate tail. So where it is to the heir of the first taker, and the heirs of that heir, it has been determined to be an estate tail. Indeed in all cases where the limitation is of an estate of freehold to a man, and afterwards to the heirs of his body, (whether general or special) so as to give it to the heirs as a denomination or class, the heirs shall be in by *purchase*, and not by *descent* (a). And the case stated by *Anderson*, in *Shelley's* case, 95 b. of a limitation to the use of *A.* for life, remainder to the use of his heirs, and of their heirs *female*, is the only one to the contrary; and, in that case, the word heirs *must* be a description of the persons, in order to let in the limitation to the heirs female. The cases are so well known, it would be idle to repeat them all. Those of *Burchett v. Durdant*, 2 Vent. 311. *Goodright v. Pullyn*, 2 Lord Raym. 1482, and *Coulson v. Coulson*, 2 Stra. 1125, are that they are words of limitation. But *Sayer v. Masterman*, (17th June, 1757, before the Lords Commissioners, *Willes*, *Smythe*, and *Wilnot*, goes the whole length of the present case. If there ever was an instance to shew, from the specialty of the limitation, that they were meant to take as purchasers, it was in that case, but the word being *heirs*, and chalking out the legal course of descent, it was decided otherwise. In *Garth v. Baldwin*, Lord *Hardwicke* put it that his opinion in *Bagshaw v. Spencer* turned upon there being trustees to preserve contingent remainders, and upon the testator having created contingent remainders, which the Court would carry into execution, though he had not correctly stated them as contingent remainders. Bating the learning of that case, one cannot but be rather astonished to hear grave and learned men reason that testators were acquainted with the rules and effects of contingent remainders, and yet did not know how to give a contingent remainder in proper form. Here the testator, in the limitation to *Thomas Morgan*, does interpose trustees to preserve contingent remainders, and shews his knowledge of the nature of contingent remainders, by following them through a long deduction of sons. The good sense of all these cases, is to believe that where persons have expressed themselves right, they knew what they meant. As to *Thomas Morgan's* family, he did not think it necessary to provide for distant future events, but in his own immediate family, he did mean to provide for future children, and that all his heirs of blood should take. But it is contended, that however this might be at

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(a) These words are obviously transposed, whether by the mistake of the

reporter or of the printer, does not appear.

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law, it should be construed otherwise in equity ; for that the whole fee was given to the trustees, as it might be necessary for the payment of the debts, but after the payment of the debts, the testator did not mean to leave any thing executory: No, the trustees were to stand seised to the subsequent uses. If this is not a legal estate it is only not so because the first use might absorb the whole estate. Then the only question is, whether, under the cases decided, I must consider this point, as being different in the case of legal and of equitable estates. Before *Lord Glenorchy v. Bosville*, For. 3, there was no difference. Lord Nottingham argued it very carefully, in that respect, in the Duke of Norfolk's case, and would not hold a different rule of construction in law and equity. In *Bale v. Coleman*, 1 P. W. 142.—*Phillips v. Phillips*, 2 Vern. 430, and *Watts v. Ball*, 1 P. W. 108, it was determined that a trust should undergo the same construction as a legal estate. *Trevor v. Trevor*, 1 P. W. 622, Lucas, 436.—*Jones v. Langton*, 1 Eq. Ab. 392.—*West v. Errissey*, 2 P. W. 349.—*Warwick v. Warwick*, 3 Atk. 291, were cases of marriage articles, where, if the party took an estate tail, the uses would be defeated. The Court anxiously distinguished them from cases upon wills, and determined them to be estates for life, on three grounds ; 1st, because they are upon valuable consideration ; 2d, because they are to be carried into execution against the parents ; 3d, that were they to put the children completely in the power of the parents, there would be no object of the contract at all. It is otherwise, says Lord Harcourt, (in *Bale v. Coleman*), of wills, which have not been construed on the same grounds. Though *Lord Glenorchy v. Bosville*, was founded upon *Leonard v. the Earl of Sussex*, 2 Vern. 526, yet it is observable that there the first gift was to a man and his heirs, so there was no doubt that it was an estate tail, but the intention there was clear, that it should go to the children, for it was to be so settled that the sons should not have power to dock the intail : the intent was the same, also in the case of *Lord Glenorchy v. Bosville*, which was an executory case. In *Bagshaw v. Spencer*, the Master of the Rolls took it clearly to be an estate tail, (1 Ves. 142.) but Lord Hardwicke said, that if the Court decreed a conveyance, there must be trustees to preserve the contingent remainders, therefore he must insert contingent remainders to be preserved ; and Lord Hardwicke there said, he did not contradict the Duke of Norfolk's and the other cases. A few years afterwards, *Garth v. Baldwin*, (2 Ves. 646.) was heard, and Lord Hardwicke's decree in *Bagshaw v. Spencer* was pressed upon him ; and he attempted a distinction, and said, that the construction must be according to the construction of legal estates (o), unless there was a plain intent to the contrary ; such declaration plain, as Lord Hobart expresses himself in a case on a will, as would over-rule the legal construction (*Couden v.*

(o) Vide *Lytton v. Lytton*, post, vol. iv. 411, which seems to have decided upon the ground of a plain intent.

Clerke, Hob. 29.) In *Garth v. Baldwin*, the exception taken was such a one as explained the rule, and the construction there restored the law, that trusts were to be construed in the same manner as legal estates. If that be so, there cannot be a more proper case to apply the rule than this, as there can be nothing so near to a legal estate as the present. It has occasioned much fluctuation in my mind, whether it was a legal or an equitable estate. I think, therefore, the same rule of construction must apply here as at law. Thinking, as I do, that this is an estate tail; but, whether it be so or an estate for life only, that he meant to exonerate the estate; I am extremely clear his administratrix, claiming this as a debt, cannot prevail; but the bill must be dismissed (a).

(a) In this case Lord *Thurlow*, following the example set by Lord *Northington*, in *Wright v. Pearson*, overruled the doctrine introduced by Lord *Hardwicke* in *Bagshaw v. Spencer*, which, in denying the distinction between trusts executed and trusts executory, would have given a different

construction to limitations in wills of trusts and legal estates. The great lights which have been thrown by Mr. *Fearne* upon this subject, make it unnecessary to refer to any treatise or report, except the invaluable *Essay on Contingent Remainders*.

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(p) WILLIAM PULTENEY, Esq. and FRANCES } Plaintiffs;
his Wife, - - - - -

The Earl of DARLINGTON and others, - - Defendants.

S. C.

18 Serj. Hill's
MSS. 103.

In Court, *Mich.*
1778, Lincoln's-
Inn Hall, 24th
March, 1783.

CASE:—*Henry Guy*, by will dated 6th July, 1709, devised to *John Taylour* and *Arthur Lake*, their executors and administrators, all his messuages, &c. in *Stoke Newington*, for 99 years, to commence from the 25th day of December next before the date of his will, if *Harry Pulteney*, *Edmund Serjeant*, and *John Mulcaster*, or either of them, should so long live, upon trust, to pay them certain annuities for their lives, and the overplus of the rents and profits, if any, was to remain in the hands of *Taylour* and *Lake* for the purposes thereafter mentioned, and as to the remainder, reversion and inheritance of all his said messuages and hereditaments, after the said term of 99 years, he devised the same unto *William*, late Earl of *Bath*, (then *William Pulteney*, esq.) for life, remainder to *Thomas Halsey* and his heirs, to preserve contingent remainders, remainder to the first and other sons of Lord *Bath* successively in tail male, remainder to *Harry Pulteney* for life, with like remainders to trustees to preserve contingent remainders, and to his first and other sons in tail male, remainder to *Daniel Pulteney* (the plaintiff *Frances's* late father) for life, with like remainders to trustees to preserve contingent re-

Money left by will to be laid out in land, the trustee being entitled to the money, lays part of it out in a purchase, but afterwards discharges that estate, of the trust, and making his will, gives generally, (without taking notice of this money) his real and personal estate to A. who afterwards makes his will and gives his real estate to B. and his personal to C.; the trust-money passes as personal estate.

(p) Vide *Rashleigh v. Masters*, post, vol. iii. 99. *Hickman v. Bacon*, post vol. iv. 354.

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mainders, and to his first and other sons in tail male, with remainder to *William Pulteney* (eldest son of Sir *William Pulteney* and father of Lord *Bath*) in fee. He appointed Lord *Bath*, *Taylour*, and *Lake*, executors of his will, and devised to his executors, their heirs and assigns for ever, his capital messuages, &c. at *Earls Court, Middlesex*, and certain freehold and copyhold estates at *Muswell-Hill*, theretofore mortgaged to him, to the intent that they, or the survivor, his heirs, &c. should sell the same, and lay out the money as thereafter directed. And he directed that, after his debts and legacies should be paid, all such monies or other personal estate as should remain in the hands of his executors, or be raised out of his personal estate, or by sale of his estate at *Earls Court*, or the estate mortgaged to him, should be laid out by his executors, or the survivor of them, in the purchase of lands of inheritance, which would be settled upon the same persons, or such of them as should be then living, and for such estates for life and in tail male, and in such manner as he had therein before devised the interest in his messuage, &c. at *Stoke Newington*. The testator died 22d Feb. 1710. On the 2d June, 1711, Lord *Bath* who was an acting executor, and *Harry* and *Daniel Pulteney* brought their bill in Chancery, to have the will established and the trusts carried into execution, and on the 4th of August following a decree was made for that purpose, and directing an account of the personal estate, and a sale of the real estates devised to be sold and the investment of the money in purchases of lands to be settled and ordering the money to be placed out, in the mean time, at interest. 26th August, 1713, the Master made his report, and reported that Lord *Bath* had a balance in hand of £15,327. 2s. 11d which was to be placed out. Lord *Bath* continued to receive and pay money as executor, and before July, 1722, he purchased with the testator's money £17,600 *South-sea* stock, in the names of *Taylour* and himself, *Lake* being dead. 11th July, 1722, an order was made on two petitions of *Taylour* and the plaintiffs in the cause, that the estate at *Muswell-Hill*, which had not been sold should be conveyed to the uses of the will instead of being sold and that the *South-sea* stock should be transferred to the Master who should transfer it to the three plaintiffs in the cause. The conveyance and transfers were made accordingly; the stock being increased, by an addition made by the company, to £18,700 Lord *Bath* having a power of attorney from *Harry* and *Daniel* afterwards sold out the stock, and having received £19,048. 17s. 6d trust-money, and having purchased the manor of *Bathwick*, and other estates in and near *Bath*, and the manor of *Wrington* and other estates thereabout, for £35,000, he, by indenture dated 9th Feb. 1735, demised these premises to *Harry Pulteney* (*Daniel* being dead without issue male) for 1000 years, defeasible if he should, within three years, with the approbation of the Master, lay out the £19,048. 17s. 6d. in the purchase of lands to be settled, with

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the Master's approbation, to the uses of the will, or should, within three years, lay out the money on securities, and should indemnify *Harry*, and the executors of *Daniel*, in respect of the sale of the stocks. By indentures of lease and release dated 3d and 4th *May*, 1736, to which *Harry Pulteney* was a party, reciting this security and many of the transactions, and that the manor of *Bathwick*, and the rest of that estate were worth £13,000, he in satisfaction of so much of the £19,048. 17s. 6d. conveyed the premises to the subsisting uses of the testator's will. Lord *Bath* had then a son, *William*, who was afterwards Lord Viscount *Pulteney*, and by will dated 19th *May*, 1762, reciting the conveyance in satisfaction of the £13,000, and that there remained unapplied £23,488. 2s. 1d. of the personal estate, which had been ever since, and then was in his hands, and that the manor of *Wrington*, &c. being improved, were of greater value, he devised those estates to his son *William* in tail male, remainder to *Harry* for life, remainder to his first and other sons in tail male, the subsisting uses of the will, in satisfaction of the £23,488. 2s. 1d. On the 12th *February*, 1763, *William* Lord *Pulteney* died without issue male. On the 21st *May*, 1763, *William* Earl of *Bath* made another will, which revoked the former, and without taking any notice of the £23,488. 2s. 1d. gave all his manors, &c. which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust monies (except the reversions of the estates of the late Earl of *Bradford*, and some premises in the possession of Lord *Egremont*) to his brother *Harry* in fee, and gave him all the residue of his personal estate, and made him executor. On the 7th *July*, 1764, he died without issue, and *Harry Pulteney* proved his will and took possession of his estates. On the 14th *August*, 1767, *Harry Pulteney* made his will, and (after disposing of some particular estates in *Middlesex*) gave all his other estates in *Middlesex*, and his estates in *Somerset*, *Montgomery*, *Salop*, and *York*, (except the reversion of Lord *Bradford's* estates) subject to a trust term, to his cousin the plaintiff, Mrs. *Pulteney*, for life, with remainder to her first and other sons in tail male, with remainder to her daughter *Henrietta Laura* for life, remainder to her first and other sons, remainder to the Earl of *Darlington* for life, remainder to his first and other sons, with remainders over; and gave all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors in trust, after payment of his debts, to lay out the residue in the purchase of lands, to be settled upon Lord *Darlington*, and his first and other sons, with remainders over, and appointed Lord *Darlington*, Lord *Chetwynd*, the plaintiff *William Pulteney*, and Sir *Harry Bernard*, executors of this will. On the 26th *October*, 1767, he died without issue, leaving the plaintiff *Frances* his heir, and the heir general of the family,

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family, she being the daughter of his cousin *Daniel Pulteney*. The bill was brought to have the residue of the personal estate of the testator *Henry Guy*, which was left in the hands of *William Earl of Bath*, laid out in the purchase of lands, to be conveyed to the plaintiff *Frances* in fee. The cause was heard before Lord Chancellor *Bathurst*, who dismissed the bill, and it came on upon a re-hearing before Lord Chancellor *Thurlow*, 14th November, 1778.

Mr. *Attorney-General*, Mr. *Dunning*, and Mr. *Hargrave*, for the plaintiffs.—The first of these gentlemen the Reporter did not hear, but understood that his principal argument was, that although a person entitled to a trust fund, ordered to be laid out in land, might elect in what form he would take, or dispose of it; yet as the form in which the Court considered it was that of land, which the testator had given it, the person so entitled must mark his election by some specific act, in order to divest it of the form of land. Mr. *Dunning*, the Reporter heard but imperfectly. He added to Mr. *Attorney's* argument, and particularly insisted, that both Lord *Bath*, and General (*Harry*) *Pulteney*, had died intestate with respect to this property, and it not having been in their contemplation, it must descend upon Mrs. *Pulteney*, as heir at law.

Mr. *Hargrave*.—The authorities to shew that money to be laid out in land is to be considered as land, are numerous, I shall class them under heads. First, With respect to assets,—the money so so fully becomes land, as not to be assets to pay debts, *Baden v. The Earl of Pembroke*, 2 Vern. 52.—*Lawrence v. Beverley*, 2 Keb. 841. cited 2 Vern. 55. Second, As to curtesy, where the feme-covert is an equitable tenant in tail, the husband shall have his curtesy,—*Sweetapple v. Bindon*, 2 Vern. 536.—*Lingen v. Sowray*, 1 P. W. 172. but the wife is not entitled to dower, because not dowable of an equitable estate. Third, Where a contract is made to purchase land, money thus circumstanced will pass as land, *Milner v. Mills*, Mos. 123.—*Greenhill v. Greenhill*, 2 Vern. 679.—Pr. Ch. 320. *S. C. Acherly v. Vernon*, (1 P. W. 783.) *Langford v. Pitt*, 2 P. W. 629.) Fourth, So if the agreement be entered into previous to making a will, the money will not pass as such by the will, *Alleyn v. Alleyn*, Mos. 262, *Langford v. Pitt*; but will pass as land by the word elsewhere,—*Lingen v. Sowray*,—*Guidott v. Guidott*, 3 Atk. 254. And a general devise to a legatee, will not pass money so to be laid out, *Cross v. Addenbroke*, *Fulham v. Jones*, (both in the note upon 3 P. W. 222.) *Shorer v. Shorer*, 10 Mod. 39. Equity so assimilates it to land, that where a recovery is necessary, a fine will not be sufficient, *Collwal v. Shadwell*, cited 1 P. W. 471. 485.—*Short v. Wood*, 1 P. W. 470.—*Cunningham v. Moody*, 1 Ves. 474. *Collet v. Collet*, 1 Atk. 11. Money to be laid out in land, is uniformly treated as land. The cases are of three sorts; First, of money—

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money in the hands of trustees; Second, where there is only a covenant; Third, where it is neither in the hands of trustees, nor secured by a covenant. Of the first kind is *Kettleby v. Atwood*, 1 Vern. 471. Of the second, *Knights v. Atkins*, 2 Vern. 20.—*Lancey v. Fairchild*, 2 Vern. 101.—*Scudamore v. Scudamore*, Pr. Ch. 543.—*Disher v. Disher*, 1 P. W. 204. *Fulham v. Jones*, *Edwards v. Lady Warwick*, 2 P. W. 171. 2 Bro. P. C. 494(a). *Letchmere v. The Earl of Carlisle*, 3 P. W. 211. For. 80. Of the third sort, is *Chaplin v. Horner*, 1 P. W. 483. The result is, that money agreed or directed to be laid out in land, acquires the property of descending to the heir. Secondly, That it continues so till altered by the act of a party entitled to alter it, that is, by a person having the absolute property. In the present case, Lord Bath intended to preserve it as land, and appropriated a particular estate to the uses, and kept separate accounts of it. In his will at one time, he had an intention of devising the *Wrington* estate as a satisfaction for it.—In his last will, he expressly treats the money to be laid out in land as land, “and all lands hereafter to be purchased with trust-money,” and limits it to the heirs and assigns of General Pulteney. General Pulteney’s will is general, there is nothing to be gathered from that, or from any act in his life-time, to shew any intent upon the subject. It is objected, that the words “lands, whatsoever, and wheresoever,” pass actual lands only, not money to be turned into land. This is arguing against the authorities of *Lingen v. Sowray*, and *Guidott v. Guidott*. Then the words “to be purchased,” are tied up in argument, to be in Lord Bath’s life-time. This is mere *gratis dictum*, who can doubt his intent to pass *Guy’s* trust? The gentlemen next result to the doctrine of merger, that the term in the *Wrington* estate, merged in General Pulteney; but the trust did not depend upon the term, there was another fund, the personal estate of Lord Bath.—The merger being involuntary, doth not shew the intent of the parties. Then it is objected that this differs from all the other cases,—that there are no trustees, nor any covenant.—But *Letchmere v. Letchmere* shews that the Court never wants a trustee. A covenant is equally unnecessary.—In *Letchmere v. Letchmere* the heir was a volunteer, and could not enforce the covenant. In the mortgage, Lord Bath did covenant for £19,000 of the money.—Receiving the money implies a covenant.—Suppose a testator to order a sum of money to be laid out to uses, would not the Court order it to be laid out, though there was no trustee or covenant? Another objection made is, that General Pulteney was both debtor and creditor, and so the debt was extinguished; but the error here is, the comparing this to a debt. It is not claimed by Mrs. Pulteney as a creditor, but as heir of General Pulteney. It is admitted by the last answer, that Mrs. Pulteney

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is not a creditor, but heir.—The true ground is, the intent of *Guy* to make it land, affirmed by Lord *Bath*, and not altered by General *Pulteney*. As to the *Wrington* estate being a satisfaction, that is much relied upon. The will by which that estate was to go in satisfaction, is revoked; besides, the intention, if it was as a satisfaction, is not sufficient; for under General *Pulteney*'s will she is only tenant for life. Then it is said to be like the case of *Ferrers v. Ferrers*, 1 Ch. Rep. 17, but in that case there was a special declaration converting the money into its original state, and in *Cross v. Addenbroke*, and *Fulham v. Jones*, it is held that there must be such an express declaration. The last argument the gentlemen have made use of, is the intermixture of the trust-money, with that of Lord *Bath* and General *Pulteney*. This was originally by Lord *Bath*, and he shewed that he did not, by it, intend to discharge the money of its character as land. A further argument arises from his accounts of the balance due to the trust-fund.

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Mr. *Mansfield* for the defendants.—The question is, whether Mr. *Pulteney* can take this sum of £23,000 as land, not money, under Lord *Bath*'s will, and whether it was General *Pulteney*'s intention that it should pass as land. There is no doubt that it was the intent of Lord *Bath* to give this to Lord *Darlington*. *Guy* devised the money to be laid out in land. Lord *Bath* with the trust-money, purchased *Bathwick* and *Wrington*, which last estate is now worth more than the trust-money. Lord *Bath*, soon after the purchase of *Wrington*, intended to appropriate it to the trust, and offered to sell it, but General *Pulteney* having joined in acts which would bind him, Lord *Bath* mortgaged it to him for £19,000. Lord *Bath*, when he made his first will, intended the *Wrington* estate to go in satisfaction for the trust-money. Upon the death of Lord *Bath*, nobody was entitled under *Guy*'s will but General *Pulteney*. Lord *Bath* gave all his property to General *Pulteney*. It is improbable that Lord *Bath* should mean that General *Pulteney* should take the *Wrington* estate, discharged of the trust, but that the personal property should remain liable. General *Pulteney* changed all the securities into his own name, and made the will upon which the question arises; he gives all the real estates he had, with descriptions of locality, to Mrs. *Pulteney* for life, remainder to Mr. *Pulteney* for life, remainder to the issue of Mrs. *Pulteney*, then he gives all his books, &c. and all his securities for money, to Lord *Darlington*, to be laid out in land to uses, and ultimately to Mrs. *Pulteney*, and upon his death-bed he gave Mrs. *Pulteney* £2,000 in bank bills.—Mr. *Attorney-General* did not rely much upon General *Pulteney*'s intention, for his argument was to exclude intention, but he said that money to be laid out in land was land to all intents and purposes. But certainly it is not so, it cannot be conveyed by common law conveyances.—It is true, it is so to certain purposes, it will admit of tenancy by curtesy,

curtesy, and goes to the heir not to the executor; but, except for these purposes, it is not land at all.—The counsel differ how it would pass by a will unattested; it certainly will pass by a will of personalty, as appears by *Letchmere v. Letchmere*, and is no otherwise land than with respect to succession.—It will pass by the most informal conveyance in the world. In *Edwards v. Lady Warwick*, Lord *Macclesfield* thought a parol matter would convey it.—If in the funds, it would pass by the transfer of the person having the ultimate property.—And it appears, from the cases cited, that, according to the intent of the ultimate possessor, it may be turned into money. The second proposition of Mr. *Attorney-General*, that till there is a person entitled to the ultimate remainder in fee, there is no one who can change the nature of the fund, is against the authority of *Lingen v. Sowray*, which shews that a person who has a right to the reversion, though he has not a right to the possession, may change the nature of the fund. When General *Pulteney* made his will, nobody could claim the trust-fund. *Guidott v. Guidott* supposes the election might be by the husband, who had no right to the possession. It is to be collected from the cases, as the general opinion, that the person who has the ultimate remainder may elect, to make it either real or personal, and that the intention is to be collected from circumstances in this as in other cases. Lord *Bath*, or Lord *Bath's* father, changing the nature of the property, would bind those who took after them. If the ultimate owner, though he has no right to the possession, can change it into money, then the question is, whether it was not treated as money by Lord *Bath* or General *Pulteney*. It is an undoubted fact, that *Wrington* was purchased with the trust-money, and as long as it was of importance to distinguish the property, Lord *Bath* meant *Wrington* to go in satisfaction.—After that he could not look upon any of his money as real estate. Then, as to the words in the will relating to “lands to be purchased with trust-money,” it is in proof, that there was other trust-money under the will of Sir *William Pulteney*, and this is strong to shew his intent to give nothing as land which was not land. Then there is an end of the question between us, for there was such a change that it would go to the general legatee. When General *Pulteney* changed the securities into his own name, could he have any idea that part of them were land, and would go to his heir at law? He then makes the will before stated, mentioning all his real estate, with the counties in which the respective parts lay, and gives the securities to be laid out for the use of Lord *Darlington*, &c. could he imagine that any part of that was to go to his heir in quality of heir? It is improbable that he meant to die intestate, as to any part of his property.—This question was before this Court, on a former occasion, when the opinion of the Lord Chancellor (*Bathurst*), Lord Chief Justice (*de Grey*), of the Common Pleas, and Mr. Baron *Eyre*, was, that he did not mean to die intestate as to any thing.

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The circumstance of his giving Mrs. *Pulteney* £2,000 makes it improbable that he had any idea, that she would be immediately entitled to £28,000, for he could not think that, in that case, they would want an immediate supply. So long as Lord *Pulteney* lived, who might claim an estate tail in the lands, Lord *Bath* intended *Wrington* as a satisfaction.—Supposing this did not appear to be the intention of the parties, it would remain a question, whether Mrs. *Pulteney* can claim this as land. She claims as standing in the place of General *Pulteney*. She has the trust-money, for she has the *Wrington* estate; can she claim the trust-money, when she has the estate, under the ancestor who could dispose of it? *Letchmere v. Letchmere*.—*Wilcocks v. Wilcocks*, 2 Vern. 558. As to this estate not going in satisfaction, because it is not in fee, that is a question frequently agitated with respect to satisfaction, but is of no weight here, because General *Pulteney* had a right to give it her under what limitations he pleased, or might have given it away from her.

Mr. *Kenyon*, on the same side.—It was never meant to be controverted on our part, that money once impressed with the character of land, must continue to be considered as land, but it became a question, who might elect to make the subject either land or money. No authority has been cited to prove that it must be the absolute owner. The cases prove otherwise, especially *Lingen v. Sowray*, (as reported 1 P. W. where Lord *Bathurst*, in the case of *Errington v. Broughton* (a), said it was more accurate than in any of the other books) for there it was held that the husband could elect against the heir at law, although he was not absolute owner. With respect to congruity, the gentlemen have no better luck. It is said to be incongruous, that the same property should be real in some hands, and chattel in others.—But nothing is more common in marriage settlements, than, after an estate tail, to raise terms which may be either real or chattel property. Then, as to the other question, whether Lord *Bath*, or General *Pulteney*, have elected to make this personal property. With respect to the will of General *Pulteney*, it is in evidence by Mr. *Garden*, that upon the death of Lord *Bath* he drew up (for the use of the General) a state of his property, and in that account all that was personal then, and that can be claimed as part of this was stated as personal property.—The General acted in making his will upon that representation of his property. This affords at least a strong presumption. Mr. *Attorney-General* said, there must be a clear act of election. I shall on another head cite a case, to shew that a presumption is sufficient to turn the scale. The question of satisfaction was not determined upon the former occasion. The property which we say should go in satisfaction,

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(a) 7 Bro. P. C. Ed. Toml. 461.

is property now in the possession of Mrs. *Pulteney*, and bought with the trust-money. Suppose he had left no other fund, would not the land have been liable? (q) In *Bennet v. Mayhew*,—where a steward had laid out monies remitted to him, in purchases of land in his own name, Lord *Hardwicke* thought the property so purchased liable; and that the steward should be presumed to have meant to do the just and honest thing.—Whether the purchase, in this case, was made with the trust-money, will appear from Lord *Bath*'s accounts. During the life of Lord *Pulteney*, he treated the *Wrington* estate as purchased with the trust-money. In this case of *Deacon v. Smith*, 3 Atk. 323, there was a covenant to purchase lands and settle them, the party afterwards purchased lands; Lord *Hardwicke* said, many cases had gone upon a strong presumption, and held the lands to be bound by the articles. A strong presumption that Lord *Bath* intended this estate to be a satisfaction, arises from his having set this aside as a particular fund for the purpose. He did not intend to die intestate as to any part of his property.

Lord Chancellor.—Do you contend that Lord *Bath* could make this disposition? *Lingen v. Sowray* seems to apply to General *Pulteney*, not to Lord *Bath*.

Mr. *Mansfield*.—There is no possible difference, but that the wife might have a posthumous son.

Mr. *Lee*, on the same side.—None of the gentlemen have cited a case to shew that a person having the ultimate remainder in fee may not elect, notwithstanding the possible intermediate limitations. Mr. *Dunning* seemed to say, it must be by some specific act. This doctrine, if not contrary to the other cases, is so to what was laid down in *Lingen v. Sowray*, where the single point is said to be whether the party intended to devise, and seems to prove, that wherever the judge can find that the party meant to give it as money, it must be construed so to be, and the same opinion is laid down in *Edwards v. Lady Warwick*. The only question then is, whether General *Pulteney* intended to give this as money.—General *Pulteney*'s will is not such an one, of which it can be affirmed that he was careless.—Mr. *Garden*'s evidence is very material,—he included this under the denomination of personal estate. General *Pulteney* gives all his real estates in *Middlesex*, &c. (enumerating the counties) as real estate, copying from *Garden*'s paper,—then he meant to give nothing else as real estate. Then he gives his personal estate, all his money, securities for money, goods, chattels,—in such a way, that if this was the subject of the devise, the decree is right, and my client must recover.

(q) 2 Brown, 289.

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If he knew this was stated as personal estate, and meant to give his personal estate, there can be no doubt. If it were possible for the gentlemen to contend, that there must be some prior act to change the nature of the property, it would be great ground; but there is no foundation for that in any case that I have found. It is impossible there can be a clearer case of intention.

Mr. *Attorney-General* in reply.—It is very possible to reduce the argument, upon this subject, within a much smaller scope. Had this case stood upon Lord *Bath's* will, I think there could be no doubt that General *Pulteney* would have been entitled to this, either under the general words of devise, as in *Guidott v. Guidott*, or as money to be laid out in land. Then it rests upon the acts, or the will, of General *Pulteney*. I admit that it was in the power of General *Pulteney* to say of this, let it be land, or let it be in money. But if there was no act done to shew what the intent was, with respect to the changing the nature of this property, the Court will expect as great certainty to disinherit an heir, in this case, as in every other. Mrs. *Pulteney* takes nothing under General *Pulteney's* will, and therefore, as heir at law, she has a right to every thing the ancestor has not so devised as to bar her claim. The question has been raised, whether a person who could not dispose of the subject in his life-time as money, can, by his will, alter the nature of the property.—In *Lingen v. Sowray*, the question was, whether words generally descriptive of personal property could pass a species of real property, as the words *lands* and *real estate* will pass leaseholds, though they are words to pass real estate. The Court in that case only wants to know what the testator meant to do. It is only a confirmation of *Guidott v. Guidott*, that, under a devise of real estate in certain places, trust-money to be laid out in land, which has no locality, will pass. The other proposition is, that words to pass personal property will pass certain sorts of real, under a modification. How the question would have stood between an heir at law, and a personal representative, cannot be collected.

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Lord *Chancellor*.—If the securities had been all changed, it would have been inconsistent not to have given all.

Mr. *Attorney-General*.—The proposition, for which this case was cited, that a person not having an absolute interest, may change the nature of the property, is not proved by it. The doctrine will be more consistent, that a person having only a reversionary interest, cannot dispose of it as personal property. He may undoubtedly direct it to be sold, and the money distributed; but we contend that he can only do so under the same qualifications as if he was disposing of land. In considering that point, one is led to

to consider what interests would pass upon intestacy. If one seized of real estate, articles to sell it, the real estate descends to the heir, though the price goes to the personal representative; so, where one has articted to purchase land, the money goes to his executor, though the land belongs to his heir. So where real property goes to the executor, *nominatim*, he must take it as real property. It is sufficient, for the determination of this case, to join with the gentlemen, that a person so circumstanced, may do it, but he must shew his intention so to do. As to Lord Bath, he had abandoned the intent of turning it into land, and had no such intention when he made his will;—he gave all his real estate to his heir at law, and all his personal to his next of kin. General Pulteney, therefore, took it as it then stood, that is, as real estate. Then the single question is, whether General Pulteney had made any alteration in it. It is contended that something less than a clear intent will do, and this is argued from *Deacon v. Smith*, but it is not proved by that case, that less than a clear intention will disinherit an heir at law. That is a case of a covenant to convey or settle: Lord Hardwicke, however, thought the purchases should be held to be made with a view to the covenant. But I should not be under great difficulty, if I were to admit that something less than a clear intent would do. If a man in a will omits any thing he dies intestate, whether he intended so to do or not. General Pulteney has, in fact, died intestate; all his devise of real estate is local. An estate in London, and the shares of the *Staffordshire* navigation, are not devised, and have passed to Mrs. Pulteney as heir at law. The view of *Garden's* paper was only to shew General Pulteney the income. The description used there is not ingrafted into the will. The estate in London is the first article in that account, but makes no part of the will. It is necessary, in order to take away the interest of the heir at law, to produce evidence of acts of General Pulteney to shew an intent so to do; without the testator's marking such intent, it must continue land. There is no expression in the will, that specifically, or in any way, marks out this particular property. It would be impossible, under this reasoning, there should be a case where a man had this sort of property, even without knowing it, that it would not pass.

Mr. Kenyon.—It is admitted by their own bill, that General Pulteney had changed all the securities into his own name.

Mr. Attorney-General.—It did not occur to me, that any argument could arise from an act usually done by all trustees.

Lord Chancellor.—This case is in some respects a singular one; it differs from the case where the testator has no interest in the fund, but the use of it—there he must describe it by the proper description

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tion of the fund. . But where the testator has the possession of the fund, if there were no cases upon the subject, I should think there could be no doubt as between the heir and the personal representative. The circumstance of money being possessed a great length of time, and not laid out, would be a circumstance to prevent an heir, who was a volunteer, from taking against the executor. But the cases seem to have gone to the length of this position, that the testator must have shewn an intent to exonerate the fund from the real uses. Then the question must be, whether, in this case, the testator has shewn an intention so to exonerate the fund; I see little reason to doubt that it may be conveyed as money, and the heir not take. The disposition of it, in the nature of a legacy, would exonerate it of the uses. The next case is, where no specific part of the testator's personal property is liable to the fund, and it stands merely the same as a covenant.—Then the question will be, whether he has so pointedly disposed of every thing as to carry it from the fund. Suppose he had bequeathed the stocks, leaving other property, the claim must have gone from the stocks to the other property. Here he has taken more general words, the question is, whether he has expressed them so fully as to clear the property from the uses. The case of *Lingen v. Sowray*, seems as fully reported as it can be from the Register's book. I shall take time to look into the cases.

The cause stood over, and this day *Lord Chancellor* gave judgment.

18 *Serj. Hill's*
MSS. 112. 113.

Lord Chancellor.—The question relative to this sum of £23,489 is whether it is to be considered as real or personal property; if it is real estate, it is not disposed of by the will of *Harry Pulteney eo nomine*, which he has done if it is to be considered as personal estate. If he meant to give it as personal estate, it will be sufficient, it must go as such, and I hardly know any thing that is not sufficient to shew such an intention. General *Pulteney's* will gives his real estate by local descriptions, so that he had it not in his contemplation to include these sums in that devise.—Some stress has been laid upon his giving securities for money; there seems an anxiety in the will to express his intention of giving all his personal estate. It was argued that evidence *dehors* the will ought not to be admitted to weigh in the construction of it, but the question did not turn upon his will. The question principally is, what presumption arises as to his intention, from the acts he has done. *Harry Pulteney*, at the time of his death, was as absolute an owner of this fund as could possibly be. The question is, what the law has said on this subject, I confess I have found it a matter of considerable difficulty to find the opinion of judges upon the subject, but the opinion in *Chichester v. Bickerstaff* (2 Vern. 295.) is, I think, the right opinion, notwithstanding *Letchmere v. Letch-*

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mere, (For. 80.) It is clear that had this been a fund outstanding in trustees, and it had been necessary to come hither in order to obtain it, the money, when obtained, would have been personal property. And so it would also if the trustees paid it without suit. This is supposing the estate when purchased, would be a fee-simple, for it would be otherwise in case of its being an estate tail (a). It is agreed on all hands that it would pass by a will unattested by witnesses; and in the case of *Edwards v. Lady Warwick*, (2 P. W. 171.) it was said a parol direction would do. These cases have surrounded the point. I have no doubt upon all the cases, that the slightest intention to take it as money would make it so. (r) In *Kettleby v. Atwood*, 1 Vern. 298, determined for the administratrix, and reversed by Lord Jefferies, 1 Vern. 471, the first doubt arose, and the reversal proceeded upon the cant expression, that in equity what is to be done is considered as done:—either that idea should have been carried fully out, or it should have been abandoned. I think it should have been the latter.—The matter is only in action, and the party has a right to have it applied as he thinks proper. If *A. B.* has £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished. This point was much considered in the time of *James the First*, with respect to the debtor being made executor, and it was determined, on the good sense of the case, that the rule did not apply, on account of the rights of the creditors; but if there is no legal or equitable title out against the party who is in possession of the fund, there the rule does apply, and the heir cannot say there was an use for him. The first cases were, that cited 2 Vern. 55, as founded on a general rule (*Lawrence v. Beverley*)—and *Scudamore v. Scudamore*, Pr. Ch. 543. and then *Whitwich v. Jermin*, cited 2 Vern. 58, but no particular rule can be drawn from them. Then came *Kettleby v. Atwood*, there the fund was not in the hands of the party who had a right to the money, Lord Guildford thought the wife having an estate for life, had a right to call for the money. Lord Jefferies reversed it, only citing *Lawrence v. Beverley*, 2 Keb. 841.—cited 2 Vern. 55, next came *Chichester v. Bickerstaff*, 2 Vern. 295. Lord Somers said the money had been bound by the articles, but that whilst it remains money, it shall be part of the personal estate of the person who might have aliened the land—

(r) Vide *Trafford v. Boehm*, 3 Atk. 448.

(a) Qu. if it would not have been so even in the case of its being an estate tail, provided the remainder or reversion in fee was in the tenant in tail; for then the Court would order the money to be paid to him, or the trustees might

pay it without the authority of the Court, so that the reasoning here holds in that case as it does in the case 21 MSS. 280, *Blake v. Blake*; but qu. *Barnard. Ch. Rep. 117. (Serjt. Hill).*

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afterwards was *Sweetapple v. Bindon*, 2 Vern. 536. It was cited as governing this case, but there is nothing in it conformable to the case before Lord Somers.—In *Lingen v. Sowray*, 1 P. W. 172. 176, some parts were to go as land, some as money, according to the acts done, *Letchmere v. Lady Letchmere*, For. 80. and 15 Vin. 40.—*Knights v. Atkyns*, 2 Vern. 20. the question was as to the remainder in fee, the money was not in the hands of the husband—*Disher v. Disher*, 1 P. W. 204, *Chaplin v. Horner*; 1 P. W. 483, it was upon a marriage settlement, but there the money was not in the father's possession. If the case had come before me, without the pressure of great names, I should not have decided it so, the best way would have been to have taken it as money.—*Hancock v. Hancock*, 1 Vern. 605.—(s) In *Edwards v. Lady Warwick*, 2 P. W. 171, the money vested in the hands of the trustees. I omitted *Lancy v. Fairchild*, 2 Vern. 101.—*Symons v. Rutter*, ibid. 227. I think *Hutchings* was right.—In *Oldham v. Hughes*, 2 Atk. 452, the husband claimed in opposition to his own agreement, to lay it out in land. *Guidott v. Guidott*, 3 Atk. 254, does not apply, the money was in the hands of the receiver.—*Bowes v. Lord Shrewsbury*, 5 Bro. P. C. 269 (a).—In *Cunningham v. Moody*, the question was, whether payment of the money to tenant in tail, with remainder in fee, was a good payment; held not so. It was looked upon by counsel, to be very much in point to the present case; but as to the money being paid to tenant in tail, with reversion to herself in fee, the Reporter must have mistaken the expression. The use that I make of these cases, notwithstanding the *dicta* they contain, is this, that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim, like the case of (t) *Chichester v. Bickerstaff*, against which I think there is no judgment, though there are a number of opinions.—I know no better authority than that case. But, whether that is clearly so or not, circumstances of demeanor in the person (even though slight) will be sufficient to decide it: a very little would do: receiving it from the trustees, there is no doubt would be sufficient. Lord Bath did receive it, he had it in his hands. Suppose he had it by way of covenant.—Otherwise, where would there be an end? If he kept it, subject to a covenant to lay it out, for 50 years, should the heir come for it at the end of that term? It would lead to infinite inconveniences. I am of opinion with Lord Bathurst, that the money, under the circumstances, continued money, and that the bill was rightly dismissed.

(s) Vide *Benger v. Gee*, Amb. 229. (t) Sed vide *Letchmere v. Letchmere*.

(a) Edit. Tomk. vol. v. 144.

Decree affirmed. Appeal to the House of Lords, and decree affirmed 3d May, 1786 (a).

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(a) The case upon the appeal in the House of Lords, is 7 Bro. P. C. ed. Toml. 530. It is remarkable for an extremely elaborate argument contained in the reasons for the appellants. The doctrine, as laid down in the cases which follow the present, is, that where either land is directed to be converted into money, or money to be laid out in land, from the moment the direction is given, the fund receives the impression, which will remain for the benefit of the representatives of the person absolutely entitled to it: to put an end to that impression it must either be shewn that the party entitled to the property having a right to elect in which shape he will take it, has declared that election, for which any act (however slight) denoting a change of his intention, (if by a person of competent age) is sufficient; or the property must (according to an expression used in the cases) *be at home*;

that is, the person being the absolute owner, must have in himself, the entire qualification of heir and executor; he must not only have the *jus in re*, but no other person must have any outstanding *jus ad rem*. In that case if he makes no declaration of his intention respecting it, it shall go according to the quality in which it was left by him at his death. *Wheldale v. Partridge*, 5 Ves. 588. affirmed 8 Ves. 227. *Thornton v. Hawley*, 10 Ves. 129. *Biddulph v. Biddulph*, 12 Ves. 161. *Kirkman v. Miles*, 13 Ves. 338. *Triquet v. Thornton*, ib. 345. *Van v. Barnett*, 19 Ves. 102. *Stead v. Newdigate*, 2 Meriv. 521. The idea expressed by Lord Rosslyn in *Walker v. Denne*, 2 Ves. jun. 176, that there was no equity between the representatives, has been distinctly over-ruled by Lord Eldon in *Wheldale v. Partridge*, and Sir W. Grant in *Biddulph v. Biddulph*, and *Kirkman v. Miles*.

(u) BODDAM v. RYLEY.

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This Cause stood for Judgment.

LORD CHANCELLOR.

Lincoln's-Inn
Hall, 24th March,
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BETWEEN the years 1755 and 1760, *Hough* and *Spencer*, the testators of the present plaintiff and defendant, had been in trade together, and had gotten into very involved circumstances. *Hough* died in 1764, *Spencer* in 1766. The accounts were, by *Spencer's* neglect, very much entangled. One *Blachford* was sent to *India* to settle the accounts, but the books being lost or in confusion, the principal light he could obtain was, from those of a third person, *Bond*, who had dealt with both; and difficulties still remaining, the consideration of what was due, was referred to a *Mr. Hunter*, who has reported a sum due; but the question of

In a long-unsettled partnership account, rendered intricate by the neglect of a party, he shall have no interest on the balance when settled.

(u) Post, vol. ii. p. 2, S. C. upon exceptions to the Master's report, *no interest allowed*. *Holmes v. Griffith* and *Allwright*, Reg. Lib. A. 1770. 325. Bill filed for recovering a sum of money, part of a larger sum, which had been decreed to the plaintiff by the Mayor's Court at *Calcutta*, and which remained unpaid, with *Indian interest*. The Lords Commissioners referred it to the Master to take an account of what was due to plaintiff for principal, interest, and costs, under the decree of the Mayor's Court at *Calcutta*, and the same to be computed according to the rate of interest therein mentioned.

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interest

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interest was reserved. The question now is merely upon the interest. *Spencer's* representative claims £9 *per cent.* interest from year to year, upon the ground that the books were so made up. But I think no such interest can be allowed; for although, where there are cross accounts, it is fair interest as to one against the other, yet it is not fair after closing the trade. Then whether he shall have *Indian* interest.—If accounts are regularly made up, upon *Indian* transactions, they ought to carry such interest as obtained there at the time when the transactions passed. But in this case I am against them, because no account was made up—no demand of the balance—and it was *Spencer's* fault that there was not—and because it has now been settled upon conjecture. This objection goes to the giving any interest. There are no settled accounts on which to go; I take it purely on the account as settled by *Mr. Hunter*. In what I now say, I do not proceed on the idea that the Court has interest in its discretion. There are cases of arrears of annuities, where the Court has said something that looks like a latitude, and covered itself with that expression. My opinion is, that those cases will afford special grounds, upon which interest is demandable; I take it nothing but what arises from a contract, agreement, or demand of a debt, can give rise to a demand of interest, and this Court, in these cases, follows a court of law. The decree must be therefore for payment of the money as reported due by *Hunter*, and it must be referred to the Master to enquire into the value of rupees at the time, and reduce them into sterling money (a).

(a) By the report of this case, post, vol. ii. p. 2, it appears that the present entry is erroneous, in stating this to have been the decree; it was merely a reference to the Master, to consider

whether any and what interest should be allowed upon the balance of account. For the subsequent cases as to interest, vide the Editor's note at the end of that case.

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S. C.

18 Serj. Hill's  
MSS. 100.In Court, Mich.  
Term, 1782.  
Lincoln's-Inn  
Hall, 28th March,  
1783.

The Marchioness Dowager of TWEEDALE - - Plaintiff.

The Earl of COVENTRY, HENRY FREDERICK  
THYNNE CARTERET, GEORGE THYNNE,  
THOMAS THYNNE, FRANCES HAY, an In-  
fant (Grand-daughter of the Plaintiff) and others, } Defendants.

**S**IR Robert Worsley, being seised in fee of the manors of *Chilton Candover*, and *Brown Candover*, and of other estates in *Chilton Candover*, and elsewhere in the county of *Southampton*, and being also seised in fee of estates in the *Isle of Wight*, borrowed of his brother *Henry Worsley* £6,000, and 14th February, 1736, demised part of the *Candover* estate for a term of 1000 years, to secure that sum. He afterwards, in 1738, made a further mortgage of other parts of that estate to secure £800. *Henry Worsley*, who was seised of a freehold house in *Burlington Street*, and possessed of considerable personal property, by his will in the same year 1738, devised all his real estate, and also the residue (after legacies) of his personal estate, to trustees, whom he made his executors in trust, for purposes in his will, and directed the settlement of his estates on his brother Sir Robert for life, remainder to *Thynne Worsley*, (son of Sir Robert,) for life, with remainders over in tail, which were exhausted by the death of the late Earl *Granville* without issue, remainder to his own right heirs, and he directed his personal estate to be laid out in the purchase of lands, to be settled in the same manner. *Henry Worsley* died in 1739, and Sir Robert Worsley was his heir at law. Sir Robert Worsley in 1741, borrowed £22,000 of the trust money, and he and *Thynne Worsley* his son charged part of the *Candover* estate with that sum. In 1742, Sir Robert borrowed a farther sum of £8,000 of the trust money, and he and his son jointly charged the same estate with that also. Sir Robert, being thus seised in fee of the *Candover* estates, subject to the mortgages, (which at the time of the hearing of this cause, were by some means reduced to £17,000) being also seised in fee of the estates in the *Isle of Wight*, and having a life estate in the freehold estates of *Henry*, with an ultimate remainder or reversion to himself in fee, and having an equivalent interest in the money ordered to be laid out in land, on the 4th June, 1746, made his will, reciting himself to be seised of the estates subject to incumbrances, and thereby devised the real estates in *Candover*, and

Sir R. W. seised in fee, of estates in C. which were mortgaged to a considerable amount, and also of an estate in the I. of W. and being seised for life, with an ultimate remainder or reversion in fee, after limitations in tail, to himself (as heir at law to his brother,) of an estate which was so devised by his brother, and possessed of an equal interest in money, bequeathed by him to be laid out in lands, devised the mortgaged lands to several uses, and int. al. to the plaintiff for life, remainder to her sons in tail, remainder to her daughters as tenants in common. He devised the estate [ 241 ] in the I. of W. to trustees for twenty-one years, among other uses to pay his bond and book debts, if his personal estate should not be sufficient, and by a further

clause, to pay all his debts. This trust term, jointly with the personal estate, shall exonerate the mortgaged estate. Two other questions were agitated; 1st, whether the reversion in the brother's estate, (which had fallen in since Sir R.'s death) was assets to pay his debts: 2d, as to the interest of the plaintiff, and her grand-daughter (the daughter of a deceased daughter) in the devised estates; which were not determined.

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elsewhere in the county of *Southampton*, (not in the *Isle of Wight*) to *James* and *Robert Worsley*, and their heirs, in trust by lease, mortgage, sale, or fall of timber, to raise £5,000 for his grand-daughter *Lady Frances Carteret*, (now Marchioness of *Tweedale*, the plaintiff,) and, subject to that charge, he directed the trustees to stand seised of those estates, to the use of his grandson *Robert Lord Carteret* (afterwards *Earl Granville*) for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to *all and every the daughter and daughters of the plaintiff*, lawfully to be begotten, *as tenants in common, and not as joint-tenants*, and in default of such issue, to his own right heirs. And he devised his estates in the *Isle of Wight*, to *James* and *Robert Worsley*, and *William Pick*, for twenty-one years, (subject to a charge of £1,200 per annum, to his wife for life,) upon the trusts in his will, and *inter alia*, out of the rents and profits, to keep the mansion-house at *Apledurcombe* in repair, then to pay £300 per annum to his son's wife for life, *in exoneration of the Candover estate*, and several other annuities to the amount of £740 per annum, and, after payment thereof, to pay all his *bond and book debts*, in case his personal estate should not be sufficient to pay the same, and also all his legacies and annuities, which he should give by his will, or any codicil; and subject to the said repairs, debts, &c.; and after deduction of their costs and charges, and such other payments as they should make to the crown, or any other person, by virtue or in pursuance of *any deed by him alone, or together with his son, executed*, and such sums as by covenant he was obliged, or by custom had been used, to allow to his tenants for repairs, he directed his trustees to account for all the residue and remainder of the rents, issues, and profits of the premises, so devised to them for the said term, to his cousins *James* and *Robert Worsley*, their executors, administrators, and assigns, equally to be divided between them, to whom he gave all such surplus for so long of such term as they should respectively live, and after the death of either, to pay his share to his son, and others of the family, in the manner therein mentioned, and in default of all such persons to pay the overplus, during the remainder of the said term, to the testator's own right heirs, and, subject to the said term, he devised the *Isle of Wight* estate in strict settlement. In two other clauses of the will, he recited that he had directed his trustees to pay all his *bond and book debts*, but in the last clause of the will, he directed them, after keeping down the interest of the incumbrances, to pay *all his debts*, annuities, and legacies, and gave the executors £100 each for their trouble, and declared that was all they was to have for their executorship. *Sir Robert Worsley* left one daughter, (*Thynne*, his son having died in his life-time,) the late Countess of *Granville*, his heir at law.

law.—She left a son *Robert*, late Earl *Granville*, her heir at law. *Robert* Earl *Granville* filed a bill in 1767 against the plaintiff and her son, (since deceased) and the trustees in the wills of Sir *Robert* and *Henry Worsley*, praying that the estates of Sir *Robert Worsley*, comprized in the several mortgages to *Henry Worsley* and his trustees, and subject to £3,900 of the plaintiff's fortune then unpaid, might be sold, and the money due on the incumbrances paid. On the 3d *July*, 1770, a decree was made in that cause, that an account should be taken of the several incumbrances, and that they should be discharged by sale of the premises comprized in the mortgages, and further directions were reserved. Some proceedings were had under that decree, but no report was made of the incumbrances, nor were the premises sold. *Robert* Earl *Granville* died in 1776, and by his will devised all his estates to trustees, in trust for the defendant *Henry Frederick Thynne Carteret*, for life, with remainder to the defendant *George Thynne* in tail, with remainder to the defendant *Thomas Thynne*, in fee. Lord Viscount *Weymouth*, the Countess *Cowper*, and Lord *Dysart*, are his heirs at law. *Robert* Earl *Granville* dying without issue, the *Candover* estate came to the plaintiff, by virtue of the limitations in Sir *Robert Worsley*'s will.—She had married the late Marquess of *Tweedale*, by whom she had issue one daughter, Lady *Catherine Hay*, deceased, leaving issue by her marriage with *William Hay*, Esq. the defendant, *Frances Hay*, the infant. On the 30th *April*, 1776, *Henry Frederick Thynne Carteret* filed a supplemental bill and bill of review, to carry into execution the decree of the 3d of *July*, 1770. The plaintiff, by her answer to that bill, insisted that the money advanced to Sir *Robert Worsley* upon the security of the *Candover* estates, being his debt, and being also secured by his bond, his personal estate, and the personal estate of *Henry Worsley* to be laid out in lands, ought to exonerate the *Candover* estate from the payment of those debts.—That cause came on to be heard, when the Court gave directions relative to Earl *Granville*'s will, but the same were declared to be without prejudice to the question, whether the decree of 1770 should be revived, and out of what fund the £17,000 mortgage-money should be paid, and all parties were to have leave to apply from time to time. After this the Marchioness of *Tweedale* filed the present bill, whereby she prayed that the £17,000 mortgage-money and interest might be paid out of the personal estate of Sir *Robert Worsley*, and out of the rents and profits of the estate in the *Isle of Wight*, devised to trustees for twenty-one years, and out of the real and personal estate of *Henry Worsley*, all the limitations in his will, except that to the right heirs, being determined; and that the estates devised to her might be exonerated, and possession delivered up to her, and for an account of rents and profits from the death of *Robert* Earl *Granville*, and for an account of timber cut down by *Robert* Earl *Granville*, and satisfaction for the same out of his assets.

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She claiming to be tenant in tail, under the will of Sir Robert Worsley, &c. &c.

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Mr. *Ambler* (for the plaintiff).—By her present bill, the Marchioness of *Tweedale* prays that her estate may be exonerated of this debt out of three funds. 1st, Out of the personal estate of Sir Robert; as to the application of which, as far as it will go, there can be no doubt. 2dly, Then the next question is, as to the trust-term of 21 years, on the *Isle of Wight* estate, whether that is assets.—The trust under Sir Robert's will is *to pay all my bond and book debts*—perhaps these words would not make that trust term liable—but the doubt is fully cleared up by the following words—*secured by deed by myself alone, or jointly with my son*.—The question which is made, is whether by the premises he meant those in the isle alone, or those out also, as he had mentioned that the *Candover* estate was liable to those debts; but his direction as to that peculiar estate to his executors, to pay all they should receive, (except their own legacies,) in payment of his debts, cannot be controlled to bond and book debts.—He meant to make the rents and profits of that estate part of the personalty, and subject to the debts to which the personalty was subject. Thirdly, then as to the reversion, which he has not devised. The true question is, whether the reversion of *Henry's* estate is assets of Sir Robert, and, being undevised, is assets applicable to his debts. I shall consider it under three heads; First, that undevised estate is to be applied in exoneration of that which is devised. Secondly, that the reversion is assets, and is applicable to his debts, if he has not shewn an intent to the contrary. Thirdly, that he has not expressed any such other intent. And first, as to the general question. At law, a reversion after an estate for life is assets, though a reversion after an estate tail is not, because the tenant in tail may cut off the reversion, 6 Co. 58, but, in this Court, a reversion after an estate tail is assets, *Kinaston v. Clark*, 2 Atk. 204. It is somewhat extraordinary to say, at law, that the reversion, after the estate tail is spent, is not assets, because during the estate tail it would only be assets *quando acciderint*; but in this Court it may be decreed to be sold, or if the Court would not do that, it would give leave to apply, when it should fall in. Lord *Hardwicke*, in *Kinaston v. Clark*, says such a reversion is assets. Lord *Hardwicke* there thought the devise by the son within the statute, and that the reversion was assets in *futuro*, and said this Court would go farther than the court of law in some cases, as in treating an advowson as assets, and as it does in making a debtor executor liable for his debt. But the gentlemen on the other side mean to argue, that, although this reversion would be assets of *Henry*, yet it is not so of Sir Robert, on the principle of Lord *Coke*, 1 Inst. 11 b. that he who claimeth as heir, must make himself heir to the person last seised, and that Sir Robert was never in possession. But that

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is a different question; this is only whether this reversion was not subject to the debts of Sir *Robert*. Sir *Robert* had an estate for life, and subject to intermediate estates tail, he was seised of the reversion. Such a reversion would be bound by a recognizance. *Kellow v. Rowden*, Carth. 126.—also 3 Lev. 286.—1 Show. 244. Sir *Robert* could have released or devised this reversion.—He was complete owner of it.—It was within the statutes of bankrupts, for he might depart with it.—So it was too within the statute of fraudulent devises. If he can so far exercise ownership, why should it not be assets to pay his debts? This is in fact a question between creditors and the owner of the estate, for though the bill is brought by the Marchioness, it is the same as if it was brought by the specialty creditors, and if the bill had been so brought, the Court would either order the reversion to be sold, or give leave for the parties, when it fell in, to apply. But it will be argued that this doctrine is wrong, and that though liable to the debts of *Henry*, it was not so to those of Sir *Robert*; and for this they will cite *Kellow v. Rowden*, but that case turned, not on the merits, but on the pleadings only, and it was not determined that it was not assets to pay the debts of the son, as well as those of the father. In *Kinaston v. Clark*, it was determined that the reversion was assets of the father, although the son had been in possession. Dyer, 368, pl. 46, shews that the rule in Lord Coke does not apply, for there the second son is charged as heir to the person not last seised. As to the case Cro. Car. 151.—*Brooke*, tit. *Assets by Descent*, 19 b. where he says such a reversion is not assets, adds *quære inde*, and says it has been determined otherwise; and, where the same case is cited, in *Kellow v. Rowden*, Lord Holt says, that case is not law.—Lord Coke, on warranty, says the same thing, that it is assets of the father. From the case in 2 Atk. 57. *Godolphin v. Abingdon*, it appears that the law is not against the rule of this Court. *Henry's* estate, except the house in *Burlington Street*, was personal estate. If his will was to be carried into execution, by a decree for a conveyance, the limitations must be to Sir *Robert* for life, with remainders over, remainder to the right heirs of Sir *Robert*; but a disposition to a person's own right heirs is tantamount to leaving so much undisposed of.—*Henry* could not have taken any interest by the conveyance, he being dead.—Second, the next point is, whether Sir *Robert* has shewn that the estate was to go *cum onere*. If he had done this, all I have said would have been out of the case, but he has been silent upon the subject. He has said that the estates, in and out of the island, are liable to the incumbrances; but it is not to be drawn from thence, that he meant the estates to go *cum onere*, that notice is not taken in the devising part of the will, and, under the circumstances of the case, cannot make it go *cum onere*, 2 P. W. 386. *Serle v. St. Eloy*. Third, as to the third point, what estate Lady *Tweedale* takes: she must take at least an estate for life, certainly it is given over to the

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sons in tail, then to the daughters, without any words of limitation, no doubt the intent must be, that they also should take estates tail. The Court will so construe the words as to effectuate the intent, 1 Atk. 432, where it was determined, the mother took an estate tail, for if she died without son or daughter was the same as if she died without issue, as issue must be either a son or daughter.

Upon the cause coming on again, 13th November, Mr. Ambler added to his former citations *Smith v. Parker*, 2 Bl. Rep. 1230.

*Lord Chancellor.*—Is there any case where such a reversion turns out to be assets *quando acciderint*?

*Mr. Ambler.*—That case appears to be the same as this, for the tenant for life there never was in possession of the reversion.

*Lord Chancellor.*—The argument there is not worth reading. I do not believe it was reported by Mr. Justice *Blackstone*, there the contingent uses never came into possession. It was therefore not a reversion after an estate tail, but after an estate for life only (a).

*Mr. Selwyn* (on the same side).—On the question, whether the reversion is applicable, the case in *Blackstone* is precisely in point. The case of *Kinaston v. Clark* is there cited: but, as your Lordship does not think that case of *Smith v. Parker* is to be argued from, I must argue this case as if that had never been determined. Lands descending in fee-simple must be assets to answer all such debts as the ancestor has charged upon the heir.—So a reversion after an estate for life is assets, 1 Ld. Raym. 53. It is said to have been determined that a reversion after an estate tail is not assets, but the only case cited for that doctrine, both in *Mildmay's case*, 6 Co. 42 a. and *Brediman's case*, 6 Co. 58 b. is *Terling v. Trafford*, 12 and 13 Eliz. which is no where to be found. I admit that in Lord Coke's Institute it is laid down as law: if he had been aware of any case, he would have cited it, but he only says that it is of no account in the law. It is true it is not of any present value, but it is so in *futuro cum acciderit*. Lord *Hardwicke*, in *Kinaston v. Clark* says, that to say it is not assets is a loose and incorrect expression. In practice it is considered as being of value, for the heir cannot plead *riens per descent*, but must except the reversion, Lil. Ent. 112. It is sufficient to make it assets if it ever may become of value; as an advowson in fee in gross, which though not of present value is assets, and may be extended, 2 Stra. 879. *Robinson v. Tonge*, 3 Bro. P. C. 556 (b). *Westfaling v. Westfaling*, 3 Atk. 460. So is the good-will of a public house. So in money to be laid out in land where the party will be tenant in tail, the

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(a) Vide the note at the end of the case. (b) Ed. Toml. vol. i. 114.

Court says he shall not have the money, in order that the remainderman may have his chance of the party dying before he can suffer a recovery.—This shews it is valuable, and if so it must be assets, the *quantum* of the value not being material. But it is insisted that though assets of *Henry*, it was not so of *Sir Robert*.—I can find no case on the subject but that cited from *Blackstone*, where the bond was entered into by the intermediate tenant for life.

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Mr. Price (for the infant).—The first question is, upon the common adage, that a reversion after an estate tail is not assets, which arises from a confusion of terms, and mistaking assets in reversion for assets in possession, mediate for immediate, potential for possessory. When they come into possession they are certainly valuable. In the case in the Common Pleas, Lord Chief Justice *de Grey* talked of assets mediate and immediate. *Kellow v. Rowden* turns on the same distinction.—The question there was only whether the declaration was right.—It is the best reported in 3 Mod. 253, the counsel on both sides agreed the land was chargeable for the debt, but the question turned upon the mode of pleading. It was in that point only that the plaintiff was wrong. In the present case the facts will support my argument.—*Henry Worsley* made his will in 1738, in 1739 he died. On his death, *Sir Robert* took an estate for life, with a remainder in fee, (subject to the intermediate estates,) which, whenever it came into possession, would be possessory assets for *Sir Robert's* debts, that happened in 1776, by the death of *Robert Earl Granville*, without issue. Then, and not till then, *Lady Tweedale's* estate came into possession, and *Miss Hay*, her grand-daughter, became entitled to an interest. The case in *Dyer*, 368, supports this doctrine, that the charge avails notwithstanding the intermediate estate, and says the law is the same of grandfather, father, and son, or of grandfather and two daughters. *Osbaston v. Stanhope*, 2 Mod. 50, the reversion is assets, not only of the original owner, but of all the intermediate takers. *Smith v. Parker*, 2 Bl. Rep.—*Rook v. Cleland*, 1 Ld. Raym. 53, also 1 Lutw. 503, will reprobate the case in *Bro. Assets*, 19.—*Fortrey v. Fortrey*, 2 Vern. 134, treats the reversion as assets, though the creditor must expect, till it falls in. But *Kinaston v. Clark*, is the strongest support of the doctrine, that when it comes into possession it becomes assets.—There the father, being tenant in fee, settled the estate on his first and other sons, with remainder to himself in fee. The father became indebted by bond, and died; the son came into possession, died without issue, and devised the estate. It is taken both by the bar and upon the bench that at law the reversion would be assets. *Sir Dudley Ryder*, the *Attorney-General*, said, if there had been no devise by the son, it would have been assets; for, although till it fell in it could not be sold, it might when it did come into possession.—The present Lord Chief Justice, (Lord *Mansfield*), for the defendants, did not argue

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argue that it was not assets, but that it was not within the statute of fraudulent devises, as not being the devise of the original owner, but of the tenant in tail, therefore, if that had been the case of a descent, it would have been assets. Lord *Hardwicke* said he was of opinion, that having come into possession, it was assets. Though the defendant may plead *riens per descent*, where there is a reversion after an estate tail, that does not prevent its being assets when it comes into possession. There is a liableness in it, which is sufficient to make it assets. It is like a right descended, or a rent-seck descended, where the heir had not possession; the plaintiff may extend it when it comes into possession. So where there is a dry seignior, and the defendant pleaded *riens*, afterwards a tenancy escheated, the plaintiff might extend the tenancy, 2 Inst. 293. There is a case, Cro. Eliz. 355, where tenant for life acknowledged a statute, and tenant in tail dying without issue, all the judges held the reversion liable. Secondly, in regard to the 21 years term, Sir *Robert* had the debts particularly in his contemplation, and provides for the general situation and circumstances of his estate, and the incumbrances upon it. Thirdly, as to the limitation of the estate to Lady *Tweedale*, and what estate Miss *Hay* takes, whether any, and what. The fundamental rule of construction is the intention of the testator, under which she must take an estate tail. The first object of bounty was Lord *Granville*, to whom he gave for life only, with remainder to sons only, in tail, then he gives it to Lady *Tweedale* for life, remainder to her sons in tail, "and in default of such issue, to all and every the daughter and daughters of the body of Lady *Tweedale*, lawfully issuing, as tenants in common, and not as joint-tenants, and in default of such issue," remainder over. Under these words the daughters would not take successively but together. The words are descriptive of his intent, that there should be an inheritance, and will make an estate tail, *Wyld v. Lewis*, 1 Atk. 432. No doubt the testator intended the daughters should take something.—It could not be estates for life; he would in that case have only repeated the limitations before made as to the sons.—It could not be in fee; for that he has given over. It must therefore be estates tail. Courts of Justice have gone farther than is necessary in this case to effectuate the testator's intent, *Brown v. Barkham*, Pr. Ch. 442, 461.—*Forth v. Chapman*, 1 P. W. 668.—*Roe dem. Dodson v. Grew*, 2 Wils. 322. So even where there was an intent to give an estate for life only, but there being an intent that the children should take made it an estate tail, *Robinson v. Robinson*, 1 Bur. 38. There are several instances where the words *son* and *sons* are held words of limitation, *King v. Melling*, 1 Vent. 214, 225.—*Pinbury v. Elkin*, 1 P. W. 563.—In *Evans v. Astley*, 3 Bur. 1570, it was to every son and sons, without words of limitation, and held that, according to the intent, the sons took estates tail in succession. The limitation to the daughters should be like

like that to the sons, to all and every the daughter and daughters of the body of Lady *Frances*, lawfully begotten, and to the heirs of the body of such daughter and daughters lawfully issuing. Miss *Hay*, therefore, ought now to be held to take an estate tail.

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Mr. *Simeon* (on the same side).—The question consists of three parts, branching out into this general proposition, that Miss *Hay* has now a vested estate tail in the *Candover* estate; second, that she has it exonerated from the incumbrances; which includes the third point, as to the fund from whence the debts are to be paid: that is whether the reversion is assets; for, on failure of all assets, the *Candover* estate is undoubtedly liable.—The great objection taken is, that Sir *Robert* had only a reversion in the estate, and the money to be laid out in land; and therefore that it could not be charged in the hands of the holder: but I shall contend, that the interest was an interest in possession, not in reversion. First, It is necessary to shew, that *Frances Hay* has an estate tail if it shall be held that the plaintiff, Lady *Tweedale*, has only an estate for life; and this will appear, first, from the object of the testator; secondly, from the context of the will; thirdly, from the words, which are proper for this purpose.—First, the object of the will was to provide for the children of the family: the limitation is to *Robert Earl Granville* for life, remainder to his first and other sons in tail, remainder to Lady *Tweedale* for life, and, under the subsequent limitation to her daughters, the infant is entitled to a vested remainder in tail. Secondly, This appears still more clearly by the context; for he does not give the daughters estates for life, which he certainly would have done if he had not intended them to take larger estates.—He has given to them as *tenants in common*, this shews he meant them an inheritance; as, otherwise, tenancy in common would be less beneficial to them than a joint tenancy.—Thirdly, The subsequent words, *in default of such issue*, are words of limitation.—But if the words themselves were not sufficient, they might be supplied, in order to effect the intention, *Lomax v. Holmden*, 1 Ves. 290, also in 3 P. W. 176.—3 Bulst. 127, *Evans v. Astley*, 3 Burr. 1570.—Second, supposing the infant to take a vested remainder in tail, she is entitled to take it exonerated from the incumbrances; first, by the application of the trust term of twenty-one years—this part of the case has been very fully argued—The words are *all his debts*—the word legacies is also mentioned, which must apply to the £5,000 to the plaintiff Lady *Tweedale*, which is a legacy charged on this estate which is ultimately charged: for the personal estate, or real estate undevised, must be applied in payment of such a charge before the devised estate, unless there are express words of exemption of such personal or descended estate, which is not the case here, *Galton v. Hancock*, 2 Atk. 424.—This brings me to the third question, how far Sir *Robert's* reversion in the estate

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of *Henry* is liable.—It has been hitherto contended that *Sir Robert* had a reversion, after the contingent limitations in tail, of the estate to be purchased by the personal estate of *Henry Worsley*: but if it can be proved that the ultimate limitation to *Sir Robert* was not a reversion descending, but a new interest vested in him by purchase, the whole argument, which opposed the making that estate assets to answer the debts of *Sir Robert*, must fall to the ground.—It will be necessary, for this purpose, to consider the difference between a reversion and a remainder.—A reversion is an interest remaining in a person to take effect in possession, after intermediate estates are at an end; it is a right of reverter, according to *Blackstone*, not merely a returning of the land, as *Lord Coke* calls it, 1 Inst. 142, which is descriptive only of the property *in transitu*, and not of the bare existing right.—Whereas a remainder is an existing right, not continuing in the grantor, and which was never displaced, but granted to another, to take effect after intermediate estates to other persons are at an end. *Sir Robert Worsley* being the first taker of the remainder, he must *ex vi termini*, take by purchase, either under deed or will; consequently, had land been purchased and settled under *Henry's* will, immediately after his death, *Sir Robert* must have taken the ultimate limitation in fee as a remainder. For *Sir Henry* being dead, and the land not to be purchased till after his death, nothing could be conveyed to him, and consequently nothing could descend to *Sir Robert* as his heir, and there was no middle way.—*Sir Robert*, had the conveyance been made, must have taken either by descent or purchase; the former being impossible, for the reasons before given, *Sir Robert* must have taken by purchase; in which case, the defendant being heir of the first purchaser, the lands in his possession would be liable to the bond-debts of *Sir Robert*.—The words “*my right heirs*” would have been considered as descriptive of the persons meant to take the ultimate remainder in fee, of the lands to be purchased at the death of *Henry*, and therefore the ultimate limitation must have been made to *Sir Robert*, as his right heir, at his death.—And, if the intention was otherwise, the law would not suffer it to take effect.—The rule that “what ought to be done is considered as done in this Court” must apply here, and laches of trustees cannot affect the rights of parties, which would be the case if the lands were to be purchased now, and the conveyance made to the person who is now right heir of *Henry*, as such person may not be such right heir to *Sir Robert*, as would take the remainder by descent from him—This property is therefore now assets to pay the debts of *Sir Robert*.

Mr. Attorney-General, (for the defendants, *H. F. T. Carteret*, devisee for life, of *Robert Earl Granville*, who was heir at law, both to *Henry* and *Sir Robert Worsley*, and claims the reversion in fee of *Henry Worsley's* estate, and an estate for life in *Sir Robert*



*Robert Worsley's* estate, after the estates, whatever they may be, of the plaintiff, and defendant *Frances Hay*.—It is impossible to support the position that the £5,000 is a debt of *Sir Robert*; it is a mere charge on the estate. First: The most important question for my client to contend is, that the estate devised to him by *Lord Granville* is to be exonerated by the twenty-one years term. The mortgages must be paid from that term, which is charged with all his debts. The rule of construction of wills is to give effect, if possible, to every word; but, if there be any ambiguity, the last words make the will of a testator.—Second: The next question is, whether the estate devised to the plaintiff, does not come to her *cum onere*,—this depends upon the words so often alluded to, “in pursuance of any deed executed by me alone, or jointly with my son.”—These words can have no effect, unless they are applied to the charges created by them. The property disposed of by that devise must therefore be charged. *Serle v. St. Eloy*, 2 P. W. 386, is not so accurately reported as *Peere Williams* generally does. It appears, by searching the record, that subsequent to the devise of the estate, subject to the incumbrances upon it, the devise of other lands, was to pay *all* his debts, though the word *all* is omitted by the Reporter.—Third: Then as to the question whether the reversion is subject to the debts. *Mr. Simeon's* argument does not extend to the real estate of *Henry*, but only to the money to be laid out in land: I shall therefore go first upon the subject of the real estate.—I contend that is not assets of *Sir Robert*. By Co. Lit. 11 b. 15 a, a person claiming as heir, must make himself heir to the person last seised. Would an action, on the bond of *Sir Robert*, lie against *Mr. Carteret*? In order to make it assets to *Sir Robert*, they must shew that *Lord Granville* took as heir to *Sir Robert*, which cannot be.—Suppose *Sir Robert* had had a son and a daughter by one *venter*, and a son by another *venter*, the eldest son died, not having come into possession, the reversion would not go to the daughter, but to the second son, as heir to the father, in whom the reversion first vested. In Hargr. Co. Lit. 11 b. the case is put of grandfather, father, and son; the father bound in an obligation dies, leaving the grandfather, the son is not liable, because he may make himself heir to the grandfather. It is in *Lord Hale's* note, one of whose notes was relied upon in *Drury v. Drury*, as a very great authority (a).—As to the cases cited, not one of them is like the present. In *Kinaston v. Clark*, the person who took by purchase created the debt.—As to those supposed by *Mr. Ambler*, which, not being assets at law, would be assets in equity, they are not so. He instanced advowsons; but, by 1 Jones, 24, they are extendible; and in 3 P. W. 401, it was held that an advowson was assets, and

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(a) See *Lord Hardwicke's* observations upon them, in the *Earl of Buckinghamshire v. Drury*, 2 Eden, 64.

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Lord *Talbot* said he wondered it ever was doubted. It is a case constantly occurring, that property which the party, whilst living, may dispose of, will not be liable after his death. As in the case of a copyhold, and estates *per autre vie*, where before the statute of frauds, the heir was a special occupant.—In *Kellow v. Rowden*, the person who created the debt created the estate also, and the same was the case in that cited from *Lily's Entries*. But in this, if an action was brought against Mr. *Carteret*, Sir *Robert Worsley* would not be named as one of the persons from whom Lord *Granville* claimed. As to Mr. *Simeon's* question, with respect to the money to be laid out in land, if Sir *Robert* was a purchaser of the reversion, it would undoubtedly be assets; but there was an interest in *Henry*, which descended to Sir *Robert*: whether it be to be called a reversion, or by any other name, the consequence must be the same. Suppose he had ordered the estate to be settled, and not named a remainder-man, the remnant would have gone to somebody claiming under him. In *Robinson v. Knight (a)*, 18th February, 1761, before Lord *Northington*, the testatrix gave personal estate to be laid out in lands to be settled, with several remainders over, remainder to her right heirs; then a residuary bequest,—the question was between the heir at law and the residuary legatee; Lord *Northington* decreed the right heir to take. The heir, in that case, could not have pleaded *riens per descent*, for the possession under the will would be assets. By the will of *Henry Worsley*, the lands to be purchased with his personal estate were given with reference to the real, to go in the same manner; now the real estate could not come to Sir *Robert* by purchase, therefore the other lands could not. As to the trust not being raised till the death of the deviser, I answer that the will is inchoate at the time of execution, and speaks to many purposes, when made; as where it gives an estate to *A. B.* who dies, living the testator: another *A. B.* comes into *esse*, he will not be entitled to take the devise. The instant *Henry Worsley* was dead, this money became real estate, and, upon the determination of the particular estate, must go to his heir at law; but here he has coupled, and united this to the real estate. There is no case in the books against the rule in Co. Lit. but that in the Common Pleas.—In *Grifford v. Barber*, December 1741, 4 Vin. 452, Lord *Hardwicke* declared his opinion, that the reversion was not liable to a bond; though a judgment, statute, or recognizance attaches upon all the real property, and follows it after it ceases to be assets. In the case of a bond, the declaration must have stated, that the bond was the bond of the person who created the reversion, and to whom the defendant is heir, and would not describe the intermediate heir.—Here the descent is immediate, from *Henry Worsley* to Earl *Granville*. Fourth: As to the interest,

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(a) Since reported, 2 Eden, 155.

the plaintiff and Miss *Hay* take.—The plaintiff clearly takes an estate for life only; the usual remainder to trustees to preserve contingent remainders, is interposed.—Miss *Hay* clearly takes nothing, for the words extend to daughters only.—Are the daughters of Earl *Granville* and those of his sons to be disinherited for Miss *Hay*? A tenancy in common cannot be taken by descent, and here are no words to give it by purchase. In the cases cited upon this part of the subject, there have been words clearly pointing out the intention. In *Robinson v. Robinson*, there was the word *descendants*, and both in that, and in *Duckenfield's* case, the taking of the name was relied upon.

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Mr. *Solicitor-General*, (on the same side).—To the second point,—Sir *Robert Worsley*, in the will, describes himself to be seized subject to incumbrances. His devisee can only take what he had to give. The plaintiff can therefore only claim the estate, so devised, subject to the incumbrances which affected it in the hands of the devisor. Then, as to the reversion,—the doctrine is the same at law and in equity; and this question at law is perfectly clear. The report of the case of *Smith v. Parker*, in *Blackstone*, must be inaccurate, for the Chief Justice is made there to doubt whether the assets are applicable first, to the debts of the father, or the son. I deny Mr. *Ambler's* doctrine as to the power of disposition; a man have a power to dispose, which, if not executed by him, his creditors can take no advantage from.—As to the lands to be purchased, they are to go in the same manner as the other part of the estate. If Mr. *Simeon's* argument be right, they must go to entirely different uses.—If there had been no remainder to the right heirs in the will, the remaining interest would have descended.—The addition of those words can make no difference. As to Miss *Hay's* interest,—the words "*such issue*," can only relate to daughters,—the Court will not supply words, to give an inheritance.

Mr. *Mansfield*, (on the same side).—First, As to the estate of plaintiff Lady *Tweedale*, and Miss *Hay*: It is clear neither the plaintiff nor her daughters, could take more than estates for their lives; the words are not sufficient to carry more, they are estates for life, expressly limited,—there are no words of limitation afterwards.—The only case at all like this, is that of *Evans v. Astley*, that turned on conjecture, arising evidently out of the will, but to construe this more than a life-estate, would be mere unsupported conjecture.—Miss *Hay* can take nothing.—Second, As to the twenty-one years term.—The testator meant to put the rents and profits of the *Isle of Wight* estates in the same situation as his personal estate, these will be liable to the same debts with the personal. Third, The plaintiff must take the *Candover* estate, *cum onere*. Robert Earl *Granville* was the first taker of the

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*Candover* estate,—the estate would be incumbered in his hands. It must be so therefore in the hands of the successive takers.—In such a case as this, the description “*subject to incumbrances*,” will weigh, how little soever it might in some others.—*Serle v. St. Eloy* does not bear upon the question. It turned upon words in the will. Fourth, Then, as to the reversion, and first, the money to be laid out in lands.—The intention was that these lands should be to the same uses as the real estate; if the distinction can be taken, the intent cannot prevail. The universal understanding of the Master’s office is, that the persons who take such reversions take by descent the words *right heirs* are never held to give an estate by purchase though “*right heir*” will.—Then as to the real estates,—there is no case except *Smith v. Parker*, to the effect of that case.—In an action against Lord *Granville*, he could not have been charged as heir of Sir *Robert*, he took as heir of *Henry*. There is a difference between the reversion in fee descending, and the land descending, as appears from *Jenks’s* case, Cro. Car. 151, and *Kellow v. Rowden*: mere seisin in law, not in fact, is not sufficient to charge the heir, Co. Lit. 239; all the old books speak of such a reversion as not being assets; being only a possibility of reverter.

Mr. *Madocks*, (on the same side).—The case of *Cunningham v. Moody*, 1 Ves. 174, shews that the reversion of money to be laid out in land is to be considered as if it was already land.—This claim must be against the heir of Sir *Robert Worsley*. It is true, that when the reversion vested in Sir *Robert*, he might have affected it by deed, will, or judgment, but the bond is a personal demand.—The creditor, to affect the heir, must either shew a lien on the land, or that the heir is bound, that he is heir of the person who made the contract, and has assets from him. As to Sir *Robert* taking the reversion by purchase, the practice at the Master’s office is to make the limitation to the right heirs of the testator. In *Brown v. Barkham*, Pre. Cha. 461, the limitation was made (according to the devise) to the heirs male of the great grandfather, who was dead.

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Mr. *Macdonald*, (for *George Thynne*, first tenant in tail under Lord *Granville’s* will, and *Thomas Thynne*, remainder-man in fee). First, as to the reversion.—The mere capacity to take an estate, after the expiration of intermediate interests, is not considered by the law as a valuable property, to be liable as assets: it may never exist, and therefore cannot be applied to the purpose. A reversion, after an estate for life, being a certainty, only postponed in point of time, is assets *quando acciderint*, but there is no case where such judgment has been given against an heir having a reversion in fee after an estate tail. Where a reversion is created by the person who also contracted the debt it is liable, because he transmits the debt with the property which he has in the land:

but

but there is no case where the land has been affected in the hands of the heir, except the ancestor, seised in fee, created the reversion as well as the debt. I rely upon there having been no such determination, and I have the authority of Lord Coke, who thought it was fair, if a principle of law does not appear to be laid down, to argue that no such principle exists.—The gentlemen on the other side now require something further, that the reversion be held assets of the person who did not create it, they must therefore shew some authority for that position. As to the estates Lady *Tweedale* and Miss *Hay* take, Lady *Tweedale* takes impeachable of waste, and with every restraint under which Lord *Granville* took it,—with respect to Miss *Hay*, an estate given to persons as tenants in common, without further words, can only be for life.

Mr. Scott, on the same side.—With respect to the reversion: I do not contend that a reversion after an estate tail is not in any case assets. It is so for the debt of the first person who was in possession, and who created the reversion, but not for the debt of the intermediate takers. The *quære* made by *Brooke, Assets by Descent*, 19, is answered by Lord *Hale*, and by other parts of *Brooke's* own book. In title *Execution*, pl. 143, he puts nearly the same case, and says it shall not be taken in execution for the father's debt, because he never was seised. In title *Recovery*, 13, the same case is again put, and *Fitzherbert*, title *Recovery*, 14, agrees with it: these restore the authority of *Brooke, Assets*, 19.—In *Godolphin v. Abingdon*, the circumstances of the case are not stated, and Lord *Hardwicke's* opinion is very short.—In the other cases, the *dicta* either imply nothing, or do not apply to the present case. In all of them the father was seised, and the creditor concluded with an averment that the defendant was heir to the debtor. So it is in *Jenks's* case, in *Bell's* case, *Hetley*, 134, the case in *Dyer*, and that in *Lutwyche*. The heir must be charged as heir to the obligor, and in respect of those lands only which he took from him.—If a son have lands, and die seised, and the lands go to the uncle, the uncle dies, and the lands go to the father, the father would not be liable to the son's bond, for the creditor must charge him as heir to the son, which cannot be, Co. Lit. 11 b. If the son made warranty, the warranty would not descend to the father, Gilb. Ten. 18, nor could he vouch as heir, Bro. Abr. tit. *Voucher*.—As to Sir *Robert* taking the lands to be bought by purchase; it has been assumed, that if a conveyance were now directed, it would be impossible to make the heir take by descent; but the conveyance must be to the heir of *Henry*, who could not be liable to Sir *Robert's* debts.—*Henry* meant his heir to take that which was already land by descent; his intention therefore was the same with respect to the lands to be purchased.—If *Henry* had taken no notice of his right heirs, I should think what was undeviseid would not go to his personal representative, as has been said.—Your Lord-

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ship, in *Pulteney v. Lord Darlington*, (ante, p. 223), said a very slight circumstance would decide it in favour of the heir or the executor.—On the authority of *Hopkins v. Hopkins*, (For. 44), I should doubt whether it could go to the personal representative, *Papillon v. Voice*, 2 P. W. 471.—*Austen v. Taylor*, before Lord Northington, 2d June, 1759.—But even a remainder may go by descent, Co. Lit. 378 b. A reversion may be so limited as to be taken by purchase. This was determined in a case before Lord Camden, and it would be nearer the intent of the testator now to limit this to the person who is very heir now of *Henry*, than to give it to the heirs of *Sir Robert*.

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Mr. *Morris*, (for the trustees of the term, the owners of the beneficial interest in the term, and who are entitled to the personal estate of *Sir Robert Worsley*).—The term of twenty-one years cannot be liable to pay the charges on the *Candover* estate, unless it is made so by the will of *Sir Robert Worsley*.—Cases are certainly not wanting to shew that the personal estate may be exonerated, and the real estate charged. It may be done either by expressly charging the real estate, or by appropriating the personalty to other uses. If a testator has charged an estate by mortgage, he may appropriate the personal estate, and leave that charged to bear the burthen. In this case there is no intention expressed of making the term liable; on the other hand, there is a recognition that the estates were liable to charges: that recognition is of itself equivalent to a charge upon the estates.—The words in the will are *bond and book-debts*, these words will not include mortgages, even though bonds were given as collateral securities, for the mortgage is a debt of a superior nature. On that ground, in the disabling statute of Queen *Elizabeth*, the enumeration of parsons, vicars, and others, is held not to include bishops.—As to the words, *subject to the incumbrances made in pursuance of any deed executed by him and his son*, *Sir Robert* clearly intended charges on that particular estate. It would be no objection, that there were no incumbrances on that estate, but in truth there was an incumbrance upon that estate of £500 *per annum*, settled on his son's wife. In four several clauses of his will bond and book-debts are expressly mentioned. In the last clause, therefore, where he mentions *all* his debts, he must be supposed to mean the debts he had before provided for, and not to introduce any new charge.—*Sir Robert* knew perfectly well how to charge the *Isle of Wight* estate, and exonerate the *Candover*; he has done so as to the £500 jointure; another argument arises from his having intailed the term upon the two *Worsleys* with cross remainders. He would certainly not take so much pains where the devisees were not likely to reap any benefit; which it was reasonable to suppose they would not, if the term was to be charged with these mortgages. The estate was only about £1,000 *per annum*, over and above Lady *Worsley's*  
charges



charge of £1,200 upon it. The annuities charged upon it by the will amounted to £740, there were pecuniary legacies to the amount of 17 or £1,800, and the simple-contract debts, paid by the trustees out of it amounted to £8,000. So that there was little probability of its producing much for the *Worsleys*, without this additional charge of £17,000, though by the accidental death of Lady *Worsley*, soon after that of the testator, they have received about 14 or £15,000 more than they have paid.—It is therefore most probable Sir *Robert Worsley* meant it should be liable to annual charges only.

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Mr. *Wilson*, on the same side.—In charging the £500 jointure to the son's wife on the *Isle of Wight* estate, Sir *Robert* expressly says, in exoneration of the *Candover* estate; if he had intended the same exoneration as to the mortgages, he would certainly have expressed himself in the same manner. Mortgages have always been considered as debts of a superior nature to bond debts, though both are by specialty, as in *Ex parte Grove*, 1 Atk. 104. Lord *Hardwicke* says, "a landlord is a creditor of a higher degree than others," though only by simple contract. Therefore the words *bond and book debts* cannot include the mortgages, they are qualifying words, and exclude other debts. *Attorney-General v. Barkham*, cited in *Stapleton v. Colville*, For. 206.

Mr. *Batt*, on the same side.—In the construction of wills, all the words are to be construed so as to stand together, if possible. Under this rule, the words *all debts* must refer to the words *bond debts and book debts* in the former clauses. There are many stronger cases, where subsequent words have been controuled by the former parts of the will.

Mr. *Ambler*, in reply.—First, as to the trust-term, Sir *Robert* has made it liable to all his debts. As to his having described himself as seised subject to incumbrances, it by no means shews that he intended the estate should remain subject to these charges; even if he had devised them *subject to the incumbrances*, it would not have prevented their being exonerated, in consequence of other expressions in the same will, as appears from the case in P.W. (*Serle v. St. Eloy*). Though the words *bond and book debts* should even be held not to include mortgages (which I do not admit) it could not affect the last clause, *all my debts*. There were no deeds executed by him and his son, but the mortgages of the *Candover* estate, so that he must have had these mortgages in view when he made the charge. Second—As to the reversion in *Henry's* estate.—This question has got divided in two—one, as to the money to be laid out in land—the other, as to the land itself. If I succeed in either of these, it will be sufficient to exonerate the *Candover* estate. As to the first of these, the case in the  
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Common Pleas is precisely in point, and it was well considered, as it was argued upon a special verdict. In respect to the second, let the money to be laid out be limited how it will, it will be within the reach of these demands. By ordering it to be to the same uses, *Henry* certainly meant to devise it, not to leave it undevised. It ought to be now limited as it would have been at the death of *Henry*, when the ultimate remainder would have been to *Sir Robert*.

*Lord Chancellor* doubted whether it would not be necessary, in order to enable him to make a decree in the present case, to rehear the former cause, in which the *Candover* estate had been decreed to be sold, in order to get rid of that decree; as, although it was abated, it was in the power of any party interested to revive it. *Mr. Ambler* insisted the interests of the several parties were entirely varied by the death of *Lord Granville*, that it would be impossible to bring on again the questions agitated in that cause. *Lord Chancellor* ordered it to stand over till the first day of next hearings after term, and desired *Mr. Ambler* to consider whether it would not be necessary to rehear it. The principal cause, and the former cause, stood in the paper. The rehearing was not gone into, and afterwards, 28th March, 1783, the *Lord Chancellor* pronounced judgment.

*Lord Chancellor*.—The great reluctance I find, in pronouncing a decree in this cause, arises from finding myself obliged to charge the trust-term of twenty-one years with the payment of the debts. This makes it unnecessary for me to decide upon the question of the reversion; if that had been necessary, the case in the Common Pleas does not so satisfy my mind (a), as to have enabled me to decide it without referring it to a court of common law. \* But I am obliged (although I am very sorry for it) to charge the trust-term with the payment of the incumbrances. Had the question stood upon the words *bond and book debts* only, it might have admitted of some doubt, though I do not see how these words, in the case of a gentleman, who can have no debts properly called

\* The question whether the reversion was assets of the person through whom it descended, to those in whom it vested in possession, was much agitated in the case of *Arundel v. Knight*, argued at *Lincoln's-Inn Hall*, 6th July, 1787, when *Lord Chancellor* expressed his opinion to be against the case in the Common Pleas; but, as this case has not received his Lordship's final decision, no direct inference can be drawn from it.

(a) The case of *Smith v. Packer* has since been expressly over-ruled by *Doe, dem. Andrew v. Hutton*, 3 Bos. & Pul. 643. There is an extremely elaborate discussion as to what shall be considered assets, in a note of *Serj. Williams* to the case of *Jefferson*

*v. Morton*, 2 Saund. 8 d. The Reader will probably be of opinion, from that general review of all the cases, that had it been necessary to decide the question, the reversion in the present case would not have been considered as assets.

book

book debts, can be other than a general charge; but the misfortune is that, by the subsequent clause, Sir *Robert* has directed his trustees to pay *all his debts, annuities, legacies, &c.* and a still greater misfortune is, that he has made his executors executors in trust, and has made this term a joint fund with his personal estate. I have tried to find an objection to this execution of the trust, but cannot.—I must therefore direct an account of the funeral expences, debts, and legacies of Sir *Robert Worsley*, and of his personal estate, and of the rents and profits of the trust term, in order that they may be first applied in discharge of the incumbrances (a).

(a) Upon the other point in this cause, see Mr. *Sanders's* note at the end of the case of *Galton v. Hancock*, 2 Atk. 438, and *Daries v. Topp*, post, 524. *Donne v. Lewis*, post, vol. ii. 257.

HONE v. MEDCRAFT.

**T**HOMAS JAMES SELBY, Esq. made his will, dated 19th August, 1768, as follows: "I give and devise to my right and lawful heir at law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers—All my manor of *Whaddon* and *Nash*, with their appurtenances, the capital messuage known by the name of *Whaddon Hall*, and also divers parcels of land, arable and meadow, situate in the parish aforesaid, with their appurtenances, and also my chace, known by the name of *Whaddon Chace*, with all the deer, soil, ground, and timber growing thereon; also all the coppices of wood, being part of the same chace; also that parcel of land, known by the name of *Whaddon Park*; also all my other messuages, farms, lands, hereditaments, and premises, situate in the several parishes of *Whaddon* and *Nash*, *Great Harewood*, &c. in the county of *Bucks*, with their rights, members, and appurtenances; to hold the said manors of *Whaddon* and *Nash*, capital messuage, ground, messuages, farms, lands, tenements, hereditaments, tithes, and premises, with their appurtenances, to my heir at law, his heirs, executors, administrators, and assigns, for ever, *subject to and chargeable* nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and *all legacies hereafter mentioned; that is to say*, to the Rev. Mr. *Thomas Sawell*, school-master, I give £1,000—to Sir *William Stonehouse*, Bart. of *Oxfordshire*, I give £1,000—to *Joseph Smith*, Esq. of *Shelbrooke Lodge*, I give £1,000—to my dear cousin *Temperance Bedford*, I give £1,000—to *E. Page* and *C. Forster*, £500 each—to *Thomas Page*, of *Waverdon*, in the county of *Bucks*, I give, £500—to Mr. *Franklyn*, who married Miss *E. Wells*, I give, £1,000

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Devise of a leasehold estate held under a college; after the will made, the lease is renewed; this new lease does not pass by the will.

A charge of legacies under a viz. does not charge the subsequent legacies on the land.

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£1,000—and to Miss Nelly Wells, and Mrs. Franklyn, late Catherine Wells, I give £100 each—eight legacies of £100 each to the Taylors—and to Charles Taylor, John Taylor, and Ann Court, an annuity of £10 each—to the poor of the parishes of Whaddon, Nash, and Totenhoe, I give £300—to the poor of Waverdon, £300—to Charles Miller, Esq. I give £500—to Mr. F. Shephard, I give £500—to Mrs. Elizabeth Howels, I give £20 a year—to John Ranby, Esq. I give £500—to Mrs. Ann Kent, sister to Temperance Bedford, I give £1,000—to Thomas Foster, I give £100, and £20 a year for life—to Mr. Simon Taylor, I give £500—to Mr. John Hall, I give £100—(there was here a considerable blank left in the will)—all which debts, and all other debts by me owed, together with all which legacies, funeral charges, and appointments, I do hereby order and direct to be paid by the said heir at law, his heirs, executors, or assigns, within twelve months after my decease; but should it so happen that no heir at law is found, I then do hereby constitute and appoint William Lowndes, Esq. of Winslow, in the county of Bucks, my lawful heir, on condition he changes his name to Selby, and I give the estates, and all the manors before mentioned, together with all rights, hereditaments, members, and appurtenances before mentioned, to the said William Lowndes, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned. Next I give and bequeath all my tenements and messuages, with the appurtenances thereto belonging, situate in St. Clement's church yard, and also all those my messuages, farms, lands, and tenements, and tithes, and hereditaments, and premises, with every their appurtenances, situate in the Isle of Ely, and also all that my manor of Herlingfordbury, in the county of Hertford, with all the rights, members, manors, and appurtenances thereto belonging, to the Rev. Mr. John Lord, of Drayton, and to Mr. Richard Filkes, the elder, their heirs, executors, administrators, and assigns, on trust to sell and dispose thereof, and the monies arising from the sale thereof, I give and bequeath to be forthwith paid into the hands of the treasurers of the three charities hereafter mentioned, for the use and behoof of the said three charities, share and share alike; (that is to say,) to the Foundling hospital, one-third share, to the Magdalen hospital, one-third share, and to the Asylum, one-third share. And I give to the said Temperance Bedford, £1,000, over and above what is before recited, *this being part of my personal estate*, together with all interest that is or shall become due, and which £1,000 is out at use, and lent by me to Sir Thomas Alston, Bart. of, &c.—I also give to the said Temperance Bedford three pictures (as described), and also an iron chest, now in the hands of Mr. Hoare, my banker, containing my mother's jewels, and some other trifles: also my mahogany chest of drawers in the dressing room at Waverdon, together with all bonds,

bonds, notes, monies, and whatever else is contained in the same.—I also give to the said *Temperance Bedford*, after the decease of my beloved Mrs. *Elizabeth Hone*, commonly called *Vane*, all that my dwelling-house at *Waverdon*, together with all messuages, farms, lauds, and tenements, hereditaments, and premises, with the appurtenances, situate in *Waverdon* aforesaid, *Aspley Guise*, *Husborne Crawley*, *Heath*, and *Reach*, in the several counties of *Bucks* and *Bedford*.—I also give and bequeath to the said *Temperance Bedford* the perpetual advowson and disposal of the living or rectory of *Waverdon* aforesaid, for ever, together with the tithes of all sorts thereof;—I give to Sir *William Shenstone*, Bart. some pictures (thereby described), and my hounds and dogs to Mr. *Small*. Next I give and bequeath to Mrs. *Elizabeth Hone*, otherwise *Vane*, all my interest, dividends, and produce, that is now due, or shall hereafter arise and become due, from all my bank-stock to me appertaining, whether bought in my name or that of any others, together with all interest, dividends, produce now due, or hereafter to arise from all my *South-sea* stock, *South-sea* annuities, indentures, bonds in Mr. *Hoare*'s hands, and all other my securities vested in the public funds, to the aforesaid *Elizabeth Hone*, alias *Vane*, for the term of her natural life, to be received by her, or by her order, and for her use and behoof.—And I do likewise give and bequeath to the said *Elizabeth Hone*, otherwise *Vane*, all that my dwelling-house at *Waverdon*, together with, &c. (as before, to *Temperance Bedford*,) together with all the use of all the furniture, plate, and every the goods, &c. contained, and now in being in the said dwelling-house, for her use, and her friends, during her natural life.—All the residue and remainder of my goods and chattels, together with the several sums of money that shall be due to me, at the time of my death, from my tenants and others, (save and except whatever bonds and other personalities are contained in the bureau, given to Miss *Bedford*,) I do hereby give and bequeath to the said Mrs. *Hone*, otherwise *Vane*, and also all monies that are vested in my banker's hands, and all money whatsoever and wheresoever (excepting as before excepted); and I do hereby constitute and appoint her, the aforesaid Mrs. *Hone*, otherwise *Vane*, together with the Rev. Mr. *John Lord*, and Mr. *R. Filkes*, the elder, aforesaid, joint executrix and executors of this my last will and testament, and I do give and bequeath to the said Mr. *John Lord*, and to Mr. *R. Filkes*, to each of them £1,000 for their trouble in executing the above trusts, and their aiding and advising Mrs. *Hone* in the management of her affairs. By a codicil, dated the same 19th August, 1768, the testator gave as follows:—After the decease of Mrs. *Elizabeth Hone*, I direct that Mr. *John Lord*, and Mr. *R. Filkes*, or the survivor, his heirs and assigns, shall immediately sell out all my money whatsoever vested in the public funds, whether *Bank* stock, *South-sea* stock, or annuities, or what else, for the best price they can get, and divide it into four equal shares,

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shares, paying one-fourth share to my cousin *Temperance Bedford*, her heirs, executors, administrators, and assigns, and the other three shares, share and share alike, to the treasurers for the charities hereinafter mentioned, for the use and behoof of the said charities; that is to say, one-third share to the *Foundling* hospital, one third share to the *Magdalen* hospital, and one-third share to the *Asylum*.

The rectory of *Waverdon* was held by the testator, by lease, from *New College, Oxford*, for the term of ten years, from 1766, and, after the will made, he surrendered up that lease and took a new lease, dated 6th *May*, 1770; from the college for ten years more, and was possessed of the rectory by virtue of that lease at the time of his decease, 7th of *December*, 1772.

On a hearing for further directions, two questions had been made. First, Whether the advowson passed by the will, or the devise was revoked by the surrender of the former, and acceptance of the new lease. Second, Whether the real estate was charged only with the legacies enumerated under the *videlicet*, or with all the legacies in the will.

*Lord Chancellor* this day gave judgment.—

I have looked over *Abney v. Miller*, (2 Atk: 593) (a), and all the other cases on the subject, and find I must contradict them all if I did not construe this devise of the leasehold estate, which was afterwards surrendered, to be a lapsed devise; it must be part of the personal estate.—The enumerated legacies are expressly charged on the estate.—According to the cases of *Adams v. Meyrick*, 1 Eq. Ab. 271, and *Gascoign v. Duncan*, in the Exchequer, 28th *Jan.* 1774, you may gather, from the parts of a will, the variation of a charge from one part of the estate to another. A probable intent would be sufficient, without implication plain, for this purpose; but it is stronger, a *multo magis* when he has clearly charged the real estate, *Stapleton v. Colville*, For. 202. Here he leaves all the estate charged with the legacies after mentioned; that is to say,—(enumerating them) and takes up the consideration of defraying them, which is to be done by his heir, or by *Lowndes*, whom he substitutes in default of an heir. He then gives a legacy out of his *personal estate*, and afterwards disposes of his leasehold and other personal estates specifically; that is, he disposes of every part of it.—But this provision does not extend to the other legacies.

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(a) See the Editor's note at the end of this case.

His



His Lordship therefore declared that the several legacies given by the testator's will to the poor of the parishes of *Whaddon*, *Nash*, *Totenhoe*, and *Waverdon*, were void, as being within the act of the 9 Geo. 2, intituled, An act to restrain the disposition of lands whereby the same become inalienable, it was ordered that what was reported due for principal and interest of the testator's debts, and the subsequent interest to be computed thereon, and also what was already reported due for principal and interest of the several other legacies given by the testator's will, and the subsequent interest to be computed thereon, except the legacies of £1,000 each given to *John Lord* and *Richard Filkes*, his executors, he raised by mortgage or sale of the testator's estate called *Whaddon Chace*, *Whaddon Park*, and other his lands subject to the payment thereof, with the approbation of the Masters: And it was ordered that the money so to be raised by such mortgage or sale should be applied in payment thereof accordingly, and as to the legacies of £1,000 each to *Lord* and *Filkes*, and the interest thereof, it was ordered that the same should be paid out of the residue of the said testator's personal estate. And it was declared that the lease of the rectory of *Whaddon*, and the lands and tithes thereto belonging, having been surrendered by the testator, and a new lease taken thereof after the making of the said testator's will, that the same fell into, and was to be considered as part of the residue of his personal estate (a), and the accumulated rents of the estate at *Whaddon*, in the meantime were ordered to be paid to the defendant *William Lowndes Selby*, and it was declared that the *Whaddon* estate, devised by the testator's will in manner therein mentioned to the said defendant, was to be considered as belonging to him, and it was ordered that he should be let into possession, and that the title-deeds should be delivered to him, and it was declared that the devise in the testator's will of the freehold and leasehold estates given to charities, were void devises, as being within the 9 Geo. 2, and that the leasehold fell into, and constituted part of the residue of the testator's personal estate\*.

\* See the case of *Coppin v. Fernyhough*, vol. ii. p. 291, where the gift being, as in this case, of a specific lease, was held to be adcmied by a subsequent renewal; though there being a codicil made after the renewal, that was held to be a republication of the will, and that the renewed lease passed thereby. But in cases where the gift of the lease is not specific, the renewal is no adcmption; therefore, where the words were "as to all and singular my leasehold estate,

(a) The Editor has compared this decree with the entry in the Register's book, which is A. 1782, fol. 355, and finds the above to be a correct report of it, Lord *Eldon* therefore in the case of *James v. Dean*, 11 Ves. 394, where he is represented to have stated that the decree was incorrectly reported in

*Brown*, must be understood to mean the observations of Lord *Thurlow*, in delivering his judgment, the report of which, as appears by the next note, is incorrect, in not having noticed the circumstance of his having over-ruled Lord *Hardwicke's* distinction, in *Abney v. Miller*.

goods,

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goods, &c." Lord *Hardwicke* said there was no doubt but the leasehold estate passed by the will; it was not a specific legacy but an enumeration of the particulars of his personal estate. *Stirling v. Lydiard*, 3 Atk. 199. (a).

(a) The doctrine upon this subject received great consideration in the late case of *James v. Dean*, 11 Ves. 363, and 15 Ves. 236. The distinction adopted by Lord *Hardwicke* in *Abney v. Miller*, 2 Atk. 593, and which is to be found in several cases cited by Mr. *Sanders*, in a note to *Carte v. Carte*, 3 Atk. 176, between a gift of a specific lease, and a gift in general terms of the testator's "leasehold (estate) of "the premises," &c. establishing that in the former case, a renewal is an redemption or revocation, not in the latter, is considered by Lord *Eldon*, (11 Ves. 390. 344. and 15 Ves. 239,) to have been over-ruled by the present case, and *Coppin v. Fernyough*, post, vol. ii. 291. His Lordship stated, (11 Ves. 394,) that he had entered in his own note of the present case, that Lord *Thurlow* said, that the distinction in *Abney v. Miller*, would not do: and his Lordship added, that the same was also stated, though it does not appear

in print, in a case of copyhold estate, in *Douglas or Cooper*; (probably the case of *Heylin v. Heylin*, Cowp. 130.) The result appears to be, that a renewal of a lease for years, is a revocation of a gift of it by will, whether such gift be in general terms, or in the form of a specific bequest; but that it depends upon the context of the whole will, whether that general doctrine is to be applied, as a testator may so express his intention as to pass any interest existing at his death, though such intention must be distinctly shown. The renewal of a lease for lives is always a revocation, the renewed lease being a new purchase of a freehold estate, which cannot pass by a will previously made. *Marwood v. Turner*, 3 P. W. 170. *Abney v. Miller*, cit. sup. also *Digby v. Legard*, 2 Dick. 500, the determination in which, according to the report, seems erroneous as far as concerns the leasehold for years.

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Lord *Thurlow* resigned the Great Seal, *Tuesday* the 8th of *April*, 1783,—and it was delivered by his Majesty to *Alexander* Lord *Loughborough*, Lord Chief Justice of the Court of Common Pleas, Sir *William Henry Ashurst*, one of the Justices of the Court of King's Bench, and Sir *Beaumont Hotham*, one of the Barons of the Court of Exchequer, as Lords Commissioners.

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## EASTER TERM.

23 GEO. III. 1783.

ALEXANDER Lord LOUGHBOROUGH, }  
 Sir WILLIAM HENRY ASHHURST, } Lords  
 Sir BEAUMONT HOTHAM, } Commissioners.  
 Sir THOMAS SEWELL, Knight, Master of the Rolls.  
 JAMES WALLACE, Esq. Attorney-General.  
 JOHN LEE, Esq. Solicitor-General.

## FIDELLE v. EVANS.

S. C.  
 1 Cox, 27.

Motion to dis-  
 miss bill without  
 costs, cannot be,  
 but upon con-  
 sent.

**A**N agreement in writing having been made, amongst the parties to this suit, a part of which was that the plaintiff's bill should be dismissed without costs, the plaintiff gave notice of motion; and Mr. *Graham* moved that it should be so dismissed: but the defendants did not consent at the bar. The Court thought they could not make an order to dismiss without costs but upon consent; but gave a rule to dismiss *unless cause* should be shewn to the contrary\*.

\* Vide *Knox v. Brown*, vol. ii. p. 186.

## Ex parte CATER.

S. C.  
 13 Serj. Hills  
 MSS. 383.  
 18 ib. 130.

A special meet-  
 ing of creditors  
 ordered, in order  
 to their consent  
 or dissent to ad-  
 mitting annui-  
 tants to prove  
 as creditors.

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**A**PETITION in the matter of *Byde* a bankrupt, by annuity creditors, that the arrears of their annuities might be computed and the growing payments valued, and that they might be admitted to prove debts to the amount under the commission: The assignees consented, but the Court ordered that a special meeting of the creditors should be called to take their opinion, whether the assignees should consent; the creditors now claiming being annuitants, who had bought for the life of the bankrupt at five years purchase, and coming in competition with fair debts (a).

(a) Vide Co. B. L. 155. et seq.

*Ex*

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S. C.

15 Serj. Hill's  
MSS. 150.*Ex parte BURROW.*

**A** PETITION of other annuity creditors in the same bankruptcy with the former, but praying in the alternative to be admitted for the value of the annuities, or for the money paid for them; ordered to stand over to be amended, by stating the time when the act of bankruptcy happened, in order to see whether or not the bond was then forfeited at law (a).

(a) Vide 49 Geo. 3. c. 121. s. 17.

S. C.

13 Serj. Hill's  
MSS. 136.**BILLINGSLY v. CRITCHET.**

**A** BILL filed by the children of the late *John Billingsly* against the widow, now married to the other defendant *Critchett*.—*J. Billingsly*, by his will, had given to the children about £4,000 stock. He had likewise made a provision for the widow, who had a further estate from her own family. The question was, whether the mother was obliged to support these children, or it was to be done by an allowance out of the interest of the stocks given to them by their father.

Lords Commissioners *Ashhurst*,  
*Hotham*.

Mother married to a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes.

*Mr. Selwyn* for the defendants, said, he admitted the practice to be, that where the father applies for a maintenance for a child out of its separate fortune, the Court refers it to the Master to inquire whether the father is of ability to maintain the child, but that there is no such reference when the mother applies. That in this case there was a discretion in the trustees, whether they would give an allowance or not, and, upon application, they thought it unnecessary. The mother is under a natural obligation to maintain her own offspring.—There is nothing in the will to restrain the trustees but their own discretion.

*Ashhurst*, Lord Commissioner.—If the mother still continued unmarried I should have some doubt; but, since her marriage, she is entitled to an allowance: otherwise it would be compelling the second husband to keep the children, who is under no natural obligation so to do. *The King v. Munday*, Fortesc. 303.

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*Hotham*, Lord Commissioner.—The Court must see what should be applied to the maintenance. It is wise to let the children have part of their fortunes applied to their education. The discretion

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BILLINGSLEY  
v.  
CARTWRIGHT.

discretion to be exercised must be under the view of this Court.—Ought not the Court to see to the application of part of the education? The second husband on his marriage thought he was to have the wife's fortune uncharged.\*

\* See on the point of this case also, that of *Woodford v. Liburn*, (20 Geo. 2 cited from a MS. in *Beit's Post Laws*, p. 87, pl. 147. [at present to be found 1 Const. 325, see also *Tubb v. Harrison*, 4 T. R. 116, and *Cooper v. North* 4 East. 76.]

Lords Commis-  
sioners, Lord  
*Loughborough*,  
*Ashurst*.

Pledge of a lease  
carried into ef-  
fect, against as-  
signees of a  
bankrupt. Evi-  
dence of the  
bankrupt, he  
having had his  
allowance and  
certificate, al-  
lowed to be read.

(1) *RUSSEL v. RUSSEL.*

A LEASE having been pledged by a person, (who afterward became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee bought this ball for sale of the leasehold estate.

*Mr. Lloyd*, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

*Mr. Kenyon*, for the defendants the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the statute of frauds.

*Lord Loughborough*.—In this case it is a delivery of the title to the plaintiff for a valuable consideration.—The Court has nothing to do but to supply the legal formalities.—In all these cases the contract is not to be performed, but is executed.

*Ashurst*, Lord Commissioner.—Where the contract is for sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

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A question arose as to reading the bankrupt's evidence he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

(2) *Hales v. Van Borchum*, 2 Vern. 617, where it is held that the deposit of a writing for the performance of a written agreement, though there was no writing declaring it to be a security, is not within the statute. Vide *Brand v. Robbs*, Prec. Can. 375. Rep. Ch. 75.



An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security \*.

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RUSSEL

RUSSEL.

\* The Reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord *Thurlow*, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of *Featherstone v. Fenwick*, May 1784, and *Harford v. Carpenter*, 17th and 18th of April, 1785, where Lord *Thurlow* held that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated; although there was no special agreement to assign, the deposit affords a presumption that such was the intent (a).

(a) The determination in the present case has been repeatedly reprobated and regretted, but the doctrine which it establishes has been considered too firmly settled to be altered. The cases upon the subject of equitable mortgages, are *Edge v. Worthington*, 1 Cox, 211. *Hankey v. Vernon*, 2 Cox, 12. *Ex parte Bulkeel*, ib. 243. *Ex parte*

*Comings*, 9 Ves. 115. *Ex parte Weatherell*, 11 Ves. 398. *Ex parte Haigh*, ib. 403. *Norris v. Wilkinson*, 12 Ves. 192. *Hiern v. Mill*, 13 Ves. 114. *Ex parte Montfort*, 14 Ves. 606. *Ex parte Langton*, 17 Ves. 227. 1 Rose, B. C. 26. *Ex parte Kensington*, 1 Ves. & Bea. 79.

*Ex parte CRINSOZ.*

THE house of *Brown* and *Collinson* having several demands on that of *Rabone* and *Crinsoz*, (which as well as the former had become bankrupt) viz.—A demand secured by an assignment of ships, another by bond, and a third by simple contract; proved the simple contract debt under the commission, and brought an action upon the bond.—This was a petition that they might elect to proceed on both at law, or under the commission.

Where a party has clearly distinct demands on a bankrupt, he may sue for one, and come under the commission for the other, but not if they are only different securities for the same debt.

Mr. *Walker*, against the petition. Notwithstanding the case *Ex parte Botteril*, 1 Atk. 109, a party having debts of different natures, or, where the debts are in different rights, may prove one, and proceed at law for the other. Where the party has proved the debt, and proceeds at law also for the same debt, he may be put to his election. The petitioning creditor cannot elect, but must proceed under the commission; *Ex parte Ward*, 1 Atk. 153, but any other creditor may elect.

Mr. *Arden*, in support of the petition. In this case it is really the same debt, the bond and the assignment both being to secure whatever was, or should become due.

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Ex parte  
CRINSOZ.

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Lord *Loughborough*, Lord Commissioner.—The petitioning creditor cannot proceed in any way but under the commission; he is precluded.—Any other creditor has his election, but he cannot take a dividend under the commission, and take the bankrupt in execution for the same debt.—He cannot take a dividend without giving up his execution; but if he has different debts he may have different remedies. But this case is different from all those in the books, there being an assignment, a bond, and another debt. If this is not covered by either of the others, they may come under the commission for that duty. But I have some doubts as to the bond. I think the creditor is bound to prove all the debts that would be covered by the certificate. In *Botterill's Case*, the bankrupt was in execution when the commission issued. In *Ward's Case*, it was held that being assignee did not preclude from election. It is now held that the creditor may prove parcel of his debt under the commission, and sue for the rest at law, where it is the same debt, and of such a nature as to be proveable under the commission: a mortgagee cannot take a dividend on the mortgage and sue upon the bond. Here the bond and the assignment seem to be the same debt. If a mortgagee has a separate debt, which cannot be tacked to the mortgage, he may proceed differently for that debt.

*Ashhurst*, Lord Commissioner.—In any case, it is hard that a creditor should both prove, and bring an action, even where the debts are distinct; but here the case is very different.

*Hotham*, Lord Commissioner.—I do not see the good sense of distinguishing the petitioning creditor from any other (a), true, he has made his election, but that applies to any creditor who has proved his debt.

*The petition stood over (b).*

(a) Vide *Ex parte Callow*, 3 Ves. 1. *Ex parte Bryant*, 1 Ves. & Bea. 215.

(b) That a creditor having debts due to him from the bankrupt of distinct natures, or in different rights, might prove one under the commission, and proceed at law for the other, was stated by Mr. Cooke, in the former edi-

tions of his valuable work, and considered as clear law by Lord Eldon, in *Ex parte Grosvenor*, 14 Ves. 587. By the 49 Geo. 3. c. 121. s. 14. this power is taken away. For the cases upon this section of the act, vide the last edition of Co. B. L. 151, also *Watson v. Meder*, 1 Selw. & Barn. 121.

## CAMPBELL v. The Earl of RADNOR.

**A**RCHIBALD Hutchinson, having a considerable estate in land, and also a large personal estate upon mortgage on lands in *Norfolk*, by his will, bearing date the 22d *July*, 1740, gave to trustees a sum of £7,000 to be laid out, after the death of his wife, in the purchase of lands in *Ireland*, the rents and profits to be distributed among poor persons in *Ireland*, who should appear to be related to him, (though ever so remotely) or, in default of poor relations of his, to poor persons in the county of *Antrim* in *Ireland*. *Elizabeth Hutchinson* his wife, proved that will, and afterwards, by her will dated 1st *August*, 1761, reciting the will of *Archibald Hutchinson*, and that his personal estate was out upon mortgage in *Norfolk*; she ordered her real estate to be sold, and the £7,000 to be paid to the uses declared by the will of *Archibald Hutchinson*. She, by the same will, gave several legacies, among others, to *Mary Call* £10, also to *Mary Wooldridge* and *Barbara Smith*, other legacies. By a codicil dated in 1768, she gave to *Mary Call* £40, instead of £10 in the will—to Mrs. *Wooldridge*, for her and her brother £100,—to *Barbara Smith* £200. By a second codicil in 1777, she gave to *Mary Call* £40 instead of £10 in the will—to *Mary Wooldridge*, for herself and family, £100—to *Barbara Smith* £300. The prayer of the bill was to establish the will, and that the second codicil should be declared to have revoked the first.

**Mr. Madocks.**—The testator's whole personal estate being upon mortgage in *Norfolk*, could not be applied to the charitable uses in *Ireland*; *Attorney-General v. Meyrick*, 2 Ves. 44: and her will confirming it, and ordering the estate to be sold to pay the £7,000 is certainly void. As to the first and second codicils to the will of *Elizabeth*, the second was made under a variation of circumstances, to enlarge some of the legacies; she considered the first codicil as being to be immediately destroyed after the execution of the second. For this fact, **Mr. Madocks** offered to read the evidence of *Hugh Jackson* the attorney, who prepared the second codicil, which being opposed—

**Lord Loughborough.**—If the reading of the evidence of *Jackson* is opposed here, I think you had better go upon it to the ecclesiastical court, for a repeal of the probate of the codicil. That evidence would have been a ground to exclude the codicil from the probate. The bequest to the charity is good, being to a charity in *Ireland* (a), if it was not made otherwise by the cir-

(a) See this case cited in *Curtis v. Oliphant v. Hendrie*, post, 571. *Hutton*, 14 Ves. 540, and particularly

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S. C.

18 Serj. Hill's MSS. 139.

Lords Commissioners, Lord Loughborough, Ashurst, Hotham.

A. H. by will, gave money upon mortgage to a charity in *Ireland*: the wife, by her will, affirming that bequest, held to be an admission of assets of the testator, and therefore good, though out of land.

There being several codicils to a will, some of which were bare repetitions of others, the court declared them to be only substitutions.

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**CAMPBELL**  
 v.  
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**RADNOR.**

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cumstance of the money being upon mortgage on an estate here, which could not be liable to the devise to a charity; but it is too late to take that objection on the will of *Elizabeth*, she admitting, by the devise to the same uses, that she had personal estate of the testator; she is therefore paying a debt, not giving money that is upon mortgage, but only admitting that she had £7,000, personal estate from him: which, as she was executrix and residuary legatee, is admitting a debt to his estate. Although the Court will not marshal assets for a charity, yet it will make the legatees go upon the mortgage (a).

The cause stood over, and coming on again a few days after, the Lords Commissioners pronounced a decree, that the second codicil was a mere substitution for the first; and, therefore, that the defendants were entitled to the legacies given by the first codicil only, and, the plaintiffs submitting, the charitable legacies were also directed to be paid.

(a) Vide *The Attorney-General v. Earl of Winchelsea*, post, vol. iii. p. 373.

Lords Commis-  
 sioners *Ashurst*  
 and *Hotham*.

A charge of debts  
 upon land, copy-  
 hold lands are  
 liable as well as  
 freehold (b).

### COOMBES v. GIBSON (a).

THE only question in this case, was, whether in failure of the personal estate, copyhold lands were liable to debts, under the common commencement of a will, "As to all my worldly estate, I desire all my just debts should be first paid."

Mr. Price for the plaintiff—cited *Cloudesly v. Pelham*, 1 Vern. 411.—2 Vern. 229. *Alcock v. Sparhawk*, 1 P. W. 444.—2 Ves. 582. where a surrender was supplied for wife and children, and extended to creditors. Pr. Ch. 449. *Harris v. Ingledew*, 3 P. W. 96. *Hassen v. Hassen*, 1776, where there were portions for children, and an annuity for their education, to be paid by the executor: but Lord Bathurst thought the heir liable.

Mr. Richards, for the defendant.—The copyhold estate is not the natural fund for the payment, even of the bond debt of the ancestor. It is too late to argue now, that freehold lands are not charged by these words; but there is no case where copyhold has been held charged, where the testator had freehold. In *Tudor v.*

(a) The entry of this case in the Register's book, is A. 1782, fol. 549.

(b) In *Judd v. Pratt*, 13 Ves. 177,

Mr. Richards stated from his recollection of the present case, that the freehold estate was nothing.

Anson,

*Anson*, 2 Ves. 582, there was no freehold estate, and therefore the words shewed the testator's intent, which must take effect—but does any such intent appear here?—Here is a freehold estate, which is the proper fund.—In *Callis v. Casborn*, 1 Eq. Ab. 124. Pr. Ch. 407.—*Lord Chancellor* would not supply the defect of a surrender, where there was freehold estate. Here the surrender is satisfied by the other devises.

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*Lord Commissioner Ashhurst*.—The doctrine is, that where the introductory words make the real estate liable, it shall extend as well to the copyhold as to the freehold lands.—The freehold is as unnatural a fund for the payment of debts as the copyhold. It is admitted, that if there had been no freehold, the copyhold would have been liable. If the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied (*a*). But I am clearly of opinion, that they both are liable.

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*Lord Commissioner Hotham*.—If the copyhold is charged by the will, there is nothing in the case to discharge it. The law follows the testator's intention, to apply the whole real estate to the payment of debts, which covers the copyhold as well as the freehold (*b*).

(*a*) See as to this *Binby v. Eley*, post, vol. ii. 325.

(*b*) See this case particularly cited in *Groscock v. Smith*, 2 Cox, 297. For the general doctrine upon the subject of supplying surrender of copyhold, vide *Lindopp v. Eborall*, post, vol. iii. 188, and the cases cited in the Editor's note; the distinction is stated to be, that where a testator having both

freehold and copyhold, but not having surrendered the copyhold to the use of his will, charges all his real estates with payment of debts, there the copyhold shall not be applied till the freehold is exhausted; but where he has surrendered them, the freehold and copyhold shall contribute rateably. Et vide *Kentish v. Kentish*, post, vol. iii. 257.

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S. C.

15 Serj. Hill's  
MSS. 361.In Court, *Hilary*  
Term, 1782.  
Lincoln's-Inn-  
Hall, 21st March,  
1783, before  
Lord *Thurlow*.—  
17th and 24th  
May, 1783, before  
the Lords Com-  
missioners.Lord *F.* left plate,  
&c. to be enjoyed  
as heir-looms, by  
the persons who  
should be in pos-  
session of his re-  
spective houses.  
A son being born  
who was tenant  
in tail, (subject to  
his father's life-  
estate) the chat-  
tels so left, vested  
absolutely in him,  
and he dying, vest  
in his father as his  
representative.

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(y) The Honorable ANDREW FOLEY and THOMAS }  
FOLEY an Infant, his Son, by the said ANDREW } Plaintiffs.  
FOLEY, his Father and next Friend, - - - }

JOHN BURNELL, HENRY KITCHEN, JOHN }  
GRANT, JOHN BATTYE, EDWARD FOLEY, } Defendants.  
and ROBERT FOLEY, D. D. (since deceased), }  
and ROBERT DALLAS, - - - - }

THIS bill was filed by *Andrew Foley* and *Thomas Foley* his son, praying that the defendants *Burnell* and *Kitchen*, late sheriffs of *London* and *Middlesex*, might deliver up plate taken by them in execution in the house of *Edward Foley*, in *Portland Place*, in the county of *Middlesex*, and for his debt, at the suit of *Grant*, who had signed to *Dallas* and *Battie*, annuitants of Lord *Foley* and *Edward Foley* the defendants in the cause, and that they might be enjoined from selling the same upon the following case.—The late Lord *Foley*, being seised in fee of *Foley-House*, in *St. Mary-le-bone*, of an house at *Stoke*, and also of an house at *Witley*, by will bearing date 19th June, 1777, gave and devised the house at *Stoke* to the defendant, Dr. *Robert Foley*, and *Abraham Turner* (since deceased) their executors, administrators, and assigns, as trustees, for the term of one hundred and one years, without impeachment of waste, remainder to the use of *Edward Foley*, his second son for life, remainder to trustees to preserve contingent remainders, remainder to trustees for a term to raise a jointure for the wife of *Edward*, remainder to other trustees for a term to raise portions for younger children, remainder to his first and other sons, remainder to plaintiff *Andrew* for life, with like remainders to preserve contingent remainders, and raise portions, remainder to his first and other sons, with remainders over; he devised *Foley House* and *Witley* to the use of his other children; he also bequeathed “all the standards, fixtures, household goods, “implements of household, furniture and pictures, gold and silver “plate, china, porcelain, glass, statues, busts, library and books, “which should be at *Stoke*, *Witley*, or *Foley House*, to be held and “enjoyed by the several persons who, from time to time, should “respectively and successively, be entitled to the use and possession “of the same houses respectively, as and in the nature of heir- “looms, to be annexed and go along with such houses respectively “for ever; but it was his will and intention that one of the services “of table plate, late belonging to *Thomas Lord Foley*, should go “to, and be enjoyed by, the possessor of *Witley*, and the other to “the possessor of *Stoke* for the time being; and appointed

(y) *Vaughan v. Burslem*, post, vol. iii. 101, and *Fordyce v. Ford*, 2 Ves. jun. 536.

“ *Andrew*



"*Andrew Foley, Lord Clanbrassil, Mary Foley, Ann Wington, Robert Foley, and Abraham Turner*, executors and "executrices of his said will." By a codicil, 17th September, 1777, the testator substituted the plaintiff *Andrew Foley* as a trustee, in the room of *Abraham Turner* deceased.—The testator died without revoking the will, otherwise than by the codicil, and *Robert Foley*, since deceased, and the plaintiff *Andrew* proved the will.—*Robert* and *Andrew* permitted *Edward* to take possession of the service of plate at *Stoke*, and he removed it to his house in town, where it was taken in execution. The bill further stated, that *Edward Foley* was only tenant for life of *Stoke*, and had no son born, that *Andrew* is a remainder-man for life, and that the plaintiff *Thomas* his son, the first remainder-man in tail, now in esse, and prayed that the plate might be restored to the house at *Stoke*, and that *Edward* might give an inventory and security for its preservation.

The cause was argued in *Hilary Term*, 1782.

Mr. Price, Mr. Kenyon, and Mr. Hollist, argued for the plaintiffs—that they had such interests as entitled them to come for a remedy into this Court. Immediately upon the death of Lord *Foley*, the property in the plate vested in the executors, but upon their assent to the legacy, the property vested in *Edward*, the first taker for life, and was divested out of the trustees; that though *Edward* had such a vested property, it was qualified; he had not such a right as would make the plate liable to an execution for his debt, for there were subsequent rights to the plate in specie, yet these were not such as to entitle their owners to bring actions at law, the executors and remainder-men must, therefore, come into this Court for their remedy.—This is the proper jurisdiction, where parties are entitled to the property in specie.—*The Duke of Somerset v. Cookson*, 3 P. W. 390. If *Edward* had contracted to sell the plate, the remedy must be here, the plaintiffs must have filed a bill to prevent the sale, to restore the goods to the house, and to give security for their production to the remainder-man. *Bracken v. Bentley*, 1 Ch. Rep. 110.—*Hart v. Hart*, 1 Ch. Rep. 260.—In *Cadogan v. Kennet*, Cowp. 432, relative to the goods settled upon the marriage of Lord *Mountford*, the trustees had the legal property, and therefore recovered; but in this case they could not have supported an action, or have applied to the Court to set aside the execution.

Mr. Thompson for the defendant, *Edward Foley*.—*Edward Foley* had a right to remove the plate, the use was not restrained to *Stoke*. It is no answer to the plaintiffs, that an action would lie at law, wherein they might recover damages; when the damages were recovered, it would be very difficult to apportion them. If a term is given to one for life, with remainder over, the executor

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assents partially. If, in this case, the assent is total, the property was out of the executors; and it is a question, whether any other person could support the action. *Andrew* could not declare as for his goods. *Edward* is equally stopped, for if the goods are his, the sheriffs are justified in taking them. Neither the remainder-man nor his son has any present interest. This Court, therefore, which loves specific justice, will take the property out of the hands of the sheriffs.

Mr. *Solicitor-General*, Mr. *Selwyn*, and Mr. *Walker*, for the defendants *Dallas* and the sheriffs.

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The goods in the houses are to go with them as heir-looms; the two sets of plate are to be enjoyed by the owners of *Stoke* and *Witley*, but are not annexed to the houses; and this set, in fact, was not at *Stoke* at the decease of the testator.—In *Trafford v. Trafford*, 3 Atk. 347, the personal estate was held not to go with the real, for want of words to annex it; in this case such words are also wanting—*Edward Foley* has the use of the goods for life, the creditors are therefore entitled to that use, which of itself is of considerable value, £16 *per cent. per annum* is paid for the use of plate; if the executors had the property, they had assented to the use only; therefore they must bring trover or detinue. It is objected that detinue could not bring the plate back if sold—no more could a decree here. In this case there is a legal remedy—*Lord Mountford's case* does not apply—that was in a court of law; there the house was settled, together with the furniture, (which was scheduled) upon the marriage. *Lord Mansfield* considered the goods so settled and scheduled as vested in the trustees, and therefore held that they could support the action. The cases cited have been between the heir and executors, or the former possessor and remainder-man; the present is between a remainder-man and fair creditors.

Lord Chancellor.—If the property was in the trustees, and they refused to assert their legal right, any person, ever so remotely interested, might come here to compel the trustees to assert their legal property; here they come to make *Edward* a trustee, to shew that he has abused his trust, and that it ought to be reposed in others for the persons interested. I do not know how to make him a trustee, for he seems to have both the legal and equitable property.

Mr. *Price*, in reply, cited *Mathew Manning's case*, 8 Co. 94.

Lord Chancellor.—The whole prayer of the bill is, that the goods be returned in specie to *Stoke House*, to the possession of *Edward Foley*, and that an inventory of them should be taken and delivered to the proper parties. This would have been ordered, as a thing of

of course, if an account had been taken.—The goods would have been delivered to the first taker, and an inventory would have been taken of them, the use of which would be, that it would make the first taker liable when the remainder should take place. The question puts the Court upon discovering what interest the first taker and the remainder-man have. The goods are to be held and enjoyed by the persons who should have the houses respectively; one set of the plate to go to and be enjoyed by the possessor of *Stoke* for the time being. I mean to state this as a matter of precedent. The creditors must come here as creditors. If they obtain this plate, they must succeed in applying it differently from the testator's intention. As to *Edward's* having an apparent property, I lay that out of the case, because it is a clear proposition, that the law does endure that, as where the property is in trustees, and the use of it given to the party, the execution would be bad, the party holding under the trustees in whom the legal property is, and there being only an equitable interest in the first taker. Then it is a material question, whether this clause in the will is to be construed as only directory, as in *Lord Mountford's Case*, where the use only was to go to the first taker. It is clear that the creditor of the trustee, taking the goods in execution, would have himself been converted into a trustee. If a trustee had himself the use of a specific chattel during his life, the equitable property would bind the legal. This differs from that—this must be interpreted a devise of personalty to *A.* for life, remainder over to persons who would have a springing use. In law it vests in such taker. When the executors deliver the chattel, it vests in the taker for life, and the estate of the executor is divested. If a term be devised, and the executor deliver the term to the first taker, the remainder-man, when entitled, might bring an ejectment. When the party becomes entitled he may bring the action. Here the legal interest vests in *Edward Foley*, and the subsequent interests are legal interests to be carried into execution when they arise. Then the question is, whether the first taker is answerable to the persons who will be entitled to the springing uses, so that they can insist that the goods shall be placed in other hands for the use of such future takers. Suppose the case of a real estate descending to the heir at law, subject to a springing use, timber falling would go to the heir at law. Suppose a chattel given to one for life, remainder in tail, which would be equivalent to a fee in the remainder-man, the person having such a springing interest might come here to prevent the destruction of the subject; but that is to prevent the use from going beyond the intent of the testator. But the question here is, whether the goods being liable in this way, is going beyond the intention. He might have let this property together with the house. If I can take it away, it is entitling the persons having such future claims, to take from him the use contrary

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trary to the testator's intention. The difficulty arises hence, that the testator, instead of vesting the property in the trustees, has vested it in *Edward Foley*, subject to the springing uses. There is a very strong principle of justice for preserving these goods for the benefit of the persons entitled, if I can so secure them.

This cause stood for judgment, 21st *March*, 1783.

*Lord Chancellor.*—This cause comes to a shorter end than was expected. The bill was filed upon a supposition that the plate was not liable to an execution, or that the trustees would have a right to secure the eventual property of it, even if they should be obliged to part with the temporary possession. The plate was ordered to be used with the house at *Stoke*, and was removed from thence to town, where it was taken in execution; the plaintiffs insist it ought not to be sold, and I had gone the length of persuading myself that this was the justice of the case, upon the authority of *Trafford v. Trafford*, 3 Atk. 347. The cases as to tenant for life giving security for the goods have been over-ruled, and the Court now demands only an inventory, which is more equal justice; as there ought to be danger in order to require security. But upon looking over the evidence, I find that *Edward Foley* had a son born in 1779, who died soon after (in fourteen days), so that the whole interest vested in that child, and in *Edward* as administrator to him.—Therefore the bill must be dismissed.

The decree not being satisfactory to the parties, as being upon a new point not made at the bar, a re-hearing was applied for, in order to let in the new point, that although such son was born, yet as he did not live to come into possession of the house at *Stoke*, the property of the chattels left as heir-looms did not vest in such son, and consequently could not vest in the father as his representative.

It came on before the Lords Commissioners, 24th *May*, 1783.

Mr. *Price*, Mr. *Kenyon*, Mr. *Poole*, and Mr. *Hollist*, argued for the plaintiff, that it was too late now, and had been so for a century past, to assert that personal property may not be limited over, till a person comes into esse who would be tenant in tail.—This point had been established in *Massenburgh v. Ash*, 1 Vern. 234, 304. *Sabbarton v. Sabbarton*, For. 55, 245, recognized in *Pelham v. Gregory*, 5 Bro. P. C. 435(a).—That the cases went further, and shewed the vesting of the chattel-interest might be suspended, not only to the birth of the son, but till he should attain his age of 21, or come into possession, as appears from *Trafford v. Trafford*, 3 Atk. 347, and *Levison v. Grosvenor*, in *Barnard*. 54, where, at the bottom of p. 62, the line of descent is

(a) See this case, 1 Eden, 518, and upon Appeal, 3 Bro. P. C. edit. Toml. 304.

pointed

pointed out, and by the \* Duke of *Bridgewater* v. *Egerton*, 2 Ves. 121, where it was suspended till the attaining 21, and giving six months

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\* This case being very imperfectly stated in Mr. *Vesey's* Report of it, the following accurate statement of it is added.

*Duke of Bridgewater*, an infant v. *Richard Littleton*, Esq. and *Rachel Duchess of Bridgewater*, his wife, *Egerton* and others.—*January* 29th and 1st *February*, 1750.

Bill states the settlement 18th and 19th *July*, 1722, on the marriage of *Scroop*, Duke of *Bridgewater*, plaintiff's father, with the defendant the Duchess, the plaintiff's mother, by which pin-money was provided for the wife, and a term created for securing it and the settlement in the usual way of strict settlement. *January* 28th, 1744, the Duke, plaintiff's father, died and left two sons, *John Lord Brackley*, and plaintiff and three daughters. By will 5th of *February*, 1744, the Duke devised his capital house in *Cleveland Court*, wherein he then dwelt, and the stables and coach-houses thereto belonging, and all his leasehold houses, stables, and coach-houses adjoining to his capital messuage, with their appurtenances, and also the use of his pictures, household goods and furniture in the said house, and the use of all his plate both in town and country, to his wife the defendant the Duchess of *Bridgewater*, during her widowhood, and desired his executors to cause an inventory to be taken of the same; but declared it to be his will, that when his eldest son for the time being should have attained his age of 21 years, or be married, he should (in case he desired the same, and gave six months notice in writing to the wife) have the said houses, pictures, household goods, furniture and plate, as also his coach-houses and stables, for his own use, paying to the wife £400 a year during her widowhood. He desired that all his books, both in town and country, should be deemed and taken as heir-looms; and should go to such person as should be entitled to the possession of his capital mansion-house at *Ashridge*, by virtue of the limitations in his settlement; and he gave the residue of his personal estate to his son *Lord Brackley*. *December* 1745, the Duchess intermarried with the defendant *Littleton*, and forfeited the devise of the house in *Cleveland Court*, &c. *February* 1747, *John Duke of Bridgewater* died under 21, intestate, and the defendant, the Duchess, administered. The defendants *Littleton*, and the Duchess and Lady *Diana Egerton*, one of the daughters, by their answer, submit whether, as the devise to the Duchess during her widowhood of the capital messuage, pictures, &c. became void on her marriage with the defendant *Littleton*, such part thereof as was personal ought not to be considered as part of the personal estate of Duke *Scroop*, undisposed of by him, or became part of the residue of his personal estate. They insist that the books did not pass to the plaintiff, with the capital house, as heir-looms, but that Duke *John* being tenant in tail in possession, took an absolute interest in the books, and he dying intestate they ought to be distributed.

*Lord Chancellor* declared, that the said testator's books, both in town and country, mentioned in his will, were, according to the events that had then happened, to be considered as part of the personal estate of the said *John* late Duke of *Bridgewater*; and his Lordship also declared, that the said *John Duke of Bridgewater* dying under the age of 21 years, and unmarried, and the plaintiff being then the eldest son of the said *Scroop*, late Duke of *Bridgewater* for the time being, would, when he should attain his age of 21 years, or be married, and on giving notice of his desire for that purpose, pursuant to the will of his said father, be entitled to the said testator's houses, coach-houses and stables, with the appurtenances in *Cleveland Court*, and also to the pictures, household goods and furniture in the said houses, and also to the said testator's plate mentioned in his said will: but that the defendant, the Duchess of *Bridgewater*, having married again, was not entitled to the £400 a year mentioned in the said testator's will, or any part thereof; and his Lordship further declared, that until the plaintiff the Duke of *Bridgewater* should attain his age of 21 years, or be married, and give such notice of his desire as aforesaid, the rents and profits which had accrued or should accrue, or be made of the said houses, with the appurtenances and furniture, from the time of the defendant the Duchess's second marriage, until

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months notice, that the law being thus, reduced the present case to a question of intention, which was, not that it should vest on the birth of a son, which would have made all the subsequent uses void, or that it should vest in any particular person, but in such person only as should come into possession of the estate, of which this chattel real was by the will constituted a member. The certainty of the person to take was therefore suspended, until it appeared by the event who suited the description, and, as if Lord *Foley* had given a real estate to *Edward* for life, and then to such person as should come into the possession of *Stoke*, the devise had been legal, and the freehold had been, in the mean while, in the heir at law; so here, in the case of the personal estate, the property in the mean time would be in the executor.—The construction here is large enough for this purpose.—'Tis given to *Edward* whilst in possession, who is to take next being uncertain till shewn by the event, but this suspension is not contrary to law, the property is *in gremio legis*.—This gives effect to all the words of the will, which are very clear, and distinguishable from those in *Pelham v. Gregory*. The remainders to *Andrew* and his son are contingent interests. In all such cases this Court is the only competent jurisdiction, and will carry the uses into execution as far as the law will permit.

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Mr. *Mansfield*, Mr. *Selwyn*, Mr. *Walker*, Mr. *Scott*, and Mr. *Harvey*, argued for the creditors and the sheriffs.—*First*, As to the remedy—that this being an absolute gift to *Edward Foley* for life, with remainder to his son, and the property being in the possession of the father, nobody could come here, there being no trust, and *Andrew* and his son having no present interest, but mere future contingent claims, on account of which the Court, even in the case of real estate, would not entertain any jurisdiction. *Hart v. Hart*, Ch. Rep. 260.—*Second*, As to the limitation.—If the plate vested in the son absolutely, there is an end of the question. This was a gift to *Edward*, remainder to his first and other sons in tail, remainder to *Andrew* and his first and other sons—in which case, by *Pelham v. Gregory*, the property vests on the birth of the son.—They did not deny that property may be so limited as to take place on a contingency during a life in being, or within 21 years after, nor that the character of heir-looms might be superinduced upon personal chattels, by compelling the tenant for life to give security.—But the question here is, whether it is extended further than the common rule, that the whole vested in the son tenant in tail.—The case in *Fitzgibbons*, 314, of the *Attorney-General v. Hall*, proves that the words which give an estate tail in the rea-

until the time that the plaintiff should attain his said age of 21 years, or be married, and give such notice of his desire as aforesaid, ought to be considered as falling into the *residuum* of the testator's real and personal estates respectively.

estate



estate, must give the absolute interest in the personalty. The principal reliance of the plaintiffs is on *Gower v. Grosvenor*, in *Barnard*. and *Trafford v. Trafford*. The first of these was, *as far as they can by law*, and the only matter decided was, that it was not the property of the tenant for life. And Lord *Hardwicke* says, “if the property was limited over after an estate tail, it would vest in the person who took the estate tail.” Lord *Hardwicke* also laid particular stress on the words, *as far as the law will permit*. He said they shewed there was a future act to be done, that the Court would direct the chattels to go as far as the law would allow—but here is no such direction, nothing executory, or any similar words. *Trafford v. Trafford* is a very different case from this.—It was to the person being 21, who should be in possession of the real estate as long as the law would permit.—The suit was brought by a tenant in tail not in possession, and Lord *Hardwicke* determined it upon the words of the will, considering them as executory, and therefore declared them to be heir-looms as long as they might be, and that the plaintiff would be entitled to them at 21. Much has been said about the intent of the testator—he has expressed too ardent an intention, and although the Court will aid the intention whilst within the rule of law, it will not where he endeavours to do what the law will not permit—Lord *Foley* would give a more durable estate in the chattels than in the real estate, for the tenant for life and the remainder-man in tail might bar the estate by recovery, but, as the present case is argued, they could not dispose of the personal chattels, and if they were to endeavour to sell by joining, yet if the remainder-man should die in the life-time of the tenant for life, the estate would go one way and the chattels another, which Lord *Foley* himself could never possibly intend. As, on the contrary, he must have intended, that whoever could convey the real estate should be able to dispose of the chattels, which is the same as that whenever a tenancy in tail vested in the real estate, a tenancy in tail should also vest in the chattels, and then the law says, that the absolute interest is vested by law, not by the act of the party, the disability the tenant in tail is under of disposing of the real estate during his minority, not preventing the law from disposing of the personal.

Lord *Loughborough*:—It is very desirable that where a point seems material it should be gone into; this was, therefore, a very proper subject for a re-hearing, but I am of opinion that the Lord *Chancellor*'s judgment was perfectly right and correct. The intention ascribed to the will by the plaintiffs is not against any rule of law. Lord *Foley* might have given the personal property in such a way as to carry that intention into execution. The only question is, whether this intention appears clearly upon the face of the will.—The words are, “as and in the nature of heir-looms,” and “that one of the services of plate should go to, and be enjoyed  
“ by,

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“by, the possessor of *Witley*, and the other to the possessor of “*Stoke*.” Upon these words the plaintiff’s counsel contend, that it is clear it shall not vest in a son of *Edward Foley*, during the life of *Edward*. It is clear it shall not vest in *Edward*, but whether it can vest during his life is the question. They have argued what would be the intention as to a son who should be born and live a day; clearly this is a fallacious mode of reasoning; you are not to reason upon subsequent events. It is clear he meant to annex the chattels to the real estate as heir-looms; all beyond that is inference: that it should vest in the son so as to go to his father would not have been the intent of Lord *Foley*.—But the Court cannot decree upon that construction; you must make the construction perfect. If it does not vest in this case, neither would it in a son attaining 21, in the life of the father. I do not see it clear that Lord *Foley* could have an idea of a case in which the estate might be sold, and yet the plate remain; but the son, attaining his age of 21, might, with the consent of the father, sell the estate; if that case had been stated to Lord *Foley*, he would have said, let them take the plate with the estate; I think, in that event, he would have given it so, though if the present case had been stated, he would not have followed the same construction. But it is sufficient for the present purpose that the intent is not clear. I cannot give it effect as an implied intent, for every implied intent must be free from doubt. But supposing for a moment this to be his intent.—It is argued, that from his anxiety to protect this property, he has given a sufficient hint to the Court to carry on the limitation.—Will not any hint which shall go to one case, go to another? Suppose a son living a day after the death of the father, would not the same argument have gone in favour of *Andrew* against the mother?—Then consider what a series of directions the Court must give in a case where there is nothing clear.—You must prevent its vesting so as to go to the father or a stranger, yet not prevent its vesting at 21, for all this might have been done with precise words; therefore the Court can go no further than the clear devise: the legal consequence is, that an event has happened which has separated the chattels from the real; the real estate will go on in the line of the devise till some one shall be able to suffer a recovery; the personal must go to the first taker in tail. The rule of law being admitted, the rules of construction are no farther necessary, than in all cases upon wills, where they apply very little. In *Pelham v. Gregory*, and every case where there are terms and real estate, the terms vesting in infant tenants in tail in reversion is always against the intention of the testator; the same general argument which has been applied here, was made use of in those cases. The Court cannot imply an intent not clearly expressed, it would be to make, not to construe, a will; we should be forming a will upon probability only. The construction must be consistent, and upon an apparent ground. The cases that have been

been cited, are *Levison v. Grosvenor*, and *Trafford v. Trafford*, they are both very inaccurately reported. In *Levison v. Grosvenor*, the decision was no more than that the personal property to go as heir-looms, was not part of the property of Sir Thomas Grosvenor. The other was only an incidental point: It was argued that Sir Thomas was heir-male of the family: Lord Hardwicke only said, the words, taken together, shewed that some person not in *esse* was in view, he does not throw out that he should not have thought them vested in a son of Sir Thomas or Sir Richard, I do not apprehend he thought the words, *as far as the law will allow*, extended the power. In *Trafford v. Trafford*, it was clear the plaintiffs should not take during the infancy; the question was whether *Sigismund* did not suit the description of the person who was to take the heir-looms as well as the residue. Lord Hardwicke held the claim to apply to different persons: when it was found who was to take, it was agreed he was not to take till 21, there was no question upon that part of the case. Both the cases prove no more than that the will might be such that the first taker should not take the whole. A tenant in tail having come into *esse*, the personal property vested in him, and through him in the father.

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Ashhurst, Lord Commissioner.—The general rule is, that where the chattel interest comes to one who would be tenant in tail of land, the limitations over are void.—There is also another rule, that the interest may be so given as not to vest absolutely in the first taker. Where the testator leaves it to the Court to make the conveyance, the Court will protect the property as far as may be; here he has taken upon him to be his own conveyancer(a). The chattels are to accompany the estate.—When a tenant in tail comes into *esse* it must vest; otherwise the absurdity must happen of the personal estate being tied up longer than the real. We can only adopt so much of the testator's intent as was legal. It must follow the rule of law; and a person becoming tenant in tail must have the absolute interest in the personal property.

Hotham, Lord Commissioner.—Wherever the intention of the testator comes under discussion, the Court desires to carry it into execution as far as possible; but if it should be so carried into execution against the rules of law, every thing would be afloat. The testator intended his plate should go to every one who came into possession of the estate; but that is impracticable, because it is absurd to put the personal estate into a better situation than the real. If the remainder-man could not have the property at 21, it would be impossible to point out when he should have it, if not at his birth. In *Gower v. Gower*, Lord Hardwicke expressed a very anxious wish to carry the intent into execution, but says it

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(a) See Lord Ellenborough and Lord Eldon's observations upon this expression of Lord Commissioner Ashhurst, 13 Ves. 225. 234. 235.

must

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must be agreeable to the rule of law. This was a vested interest in *Edward Foley's* son, and went to his father.

Decree affirmed and the original bill dismissed

From this decree there was an appeal to the House of Lords which was heard on the 12th and 13th *July*, 1784, and the following question was put to the judges: whether *Edward Foley* had such an interest in the plate in question, as rendered the plaintiff liable to an execution at the suit of the creditors, or whether the plaintiff had any such interest therein as barred such execution. And the judges differing in opinion, they were heard *seriatim* upon, on the 27th *April*, 1785, when the House affirmed the *cretal order of the Lords Commissioners*.

An action of *detinue* was afterwards brought in order to try the question again, in *B. R.* and a case reserved, which was brought on in *Easter* 1786, but the Court refused to hear an argument on a case which had been *decided in the House of Lords*. A writ of error being brought in the Exchequer Chamber, the Court affirmed the judgment without hearing any new argument on a similar reason; and the House of Lords, on a writ of *certiorari* there, affirmed that judgment also without argument (a).

(a) The decision in the present case has been followed in *Vaughan v. Burr*, 10 Ves. jun. 536, *Carr v. Lord Erroll*, 14 Ves. 478, *Stratford v. Powell*, 1 Ba. & Be. 1, and it has been considered as clear, that there could be no difference whether the estate tail was created by express words, or by words which were construed to create an estate tail, *Brounker v. Bagot*, 1 Meriv. 281. In the case of the *Countess of Lincoln v. the Duke of Newcastle*, 3 Ves. 387, Lord Rosslyn took a distinction between the case of articles, and that of a will, holding, that in the former the Court would control the legal effect of words, which would in the latter give the absolute interest immediately upon the birth of a tenant in tail. Upon appeal the House of

Lords came to no decision upon the subject, it having been rendered unnecessary by the circumstance of the tenant in tail having attained the age of twenty-one; Lord Ellenborough and Lord Erskine however expressed an opinion in favor of that distinction. In the original decree, an opinion was given by Lord Mansfield, which has subsequently received the approbation of Lord Manners, 1 Ba. & Be. 1. Lord Eldon, on the other hand, has expressed an opinion which contains a more elaborate and convincing discussion of the whole doctrine upon the subject. He expressed his conviction that the distinction in that case was wrong, and that a distinction would shake the foundation of the equity to their foundation. It has been said (14 Ves. 485) that Lord Rosslyn has since intimated that he entertains the same opinion.

TRINITY TERM.

23 GEO. III. 1783.

S. C.
1 Cox, 34.Lords Commis-
sioners, Lord
Loughborough,
Ashurst, Ho-
tham.

PRIDEAUX v. PRIDEAUX.

MR. PRICE moved that the biddings should be opened upon the several lots mentioned in the notice, and the sale set aside upon the ground of inadequacy of price, and also of irregularity in the exposure to sale, &c. The bill had been filed by small legatees for their legacies. The decree was, that the personal estate should be first applied to the payment of debts and legacies; and if there was a deficiency, that such part of the real estate as should be necessary should be sold to make it up.—Without any account taken of the personal estate, or any application on the part of creditors that appeared, and the mortgagee expressly disavowing it, the premises were advertised for sale, and sold at very inadequate prices; viz. an estate of £900 *per annum* for £12,000.—an advowson for one year's purchase—and other lots at equally small prices.—The purchasers paid their money into the Bank, and got the decree enrolled, and the Master's report confirmed as early as possible. Mr. Price cited several cases; one of *Gower v. Gower*, another of Lord *Halifax's* estate, where biddings had been opened merely on the inadequacy of price (a). The motion was opposed by Mr. Kenyon, Mr. Arden, Mr. Hardinge, and Mr. Scott, for the several purchasers, on the ground of inconvenience that arises to purchasers at the Master's chambers from the facility of opening biddings—that the difference of price might arise from the different states of war when the sales were made, and of peace now when the application came to the Court; and that the irregularities were matters to which the purchasers were strangers, and of which they could not avail themselves to get rid of their bargains if they turned out bad ones.

Biddings opened on special circumstances, but ought not to be so on mere inadequacy of price.

Lord Loughborough.—The decree was perfectly right, but in the execution of it, it was necessary to take an account of the personal estate of the late Sir——*Prideaux*, come to the hands of his widow and executrix, and of her personal estate in the

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(a) The case of *Gower v. Gower* has been since reported 2 Eden, 348, and upon appeal in the House of Lords 6 Bro. P. C. ed. Toml. 306, it appears, that instead of having been a case of mere advance of price, it was one of

considerable fraud and surprise on the part of one of the parties who confirmed the report, he having been steward of the family, and knowing more than he communicated.

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hands of her executor, which were first to be applied. charges allowed to exhaust these were shocking. One creditor (*Stokes* the steward) set up all the money he had received on account as presents, and claimed his whole bill.—The sale was ordered *March* 1781, without the application of a single creditor, at the most disadvantageous time; so that justice has not been done to the unborn children who have claims on the estate, and bargains made on the part of the purchasers, to such an amount that if it was between party and party it would perhaps entitle the vendor to relief. In the case of *Lord Gower's* estates, the sales were to persons who were neighbours, and knew much more of the value of the estates than the family. The neglect which appears here, shews much less knowledge of the value in this case than there was in that. I do not go therefore on the inadequacy of the value only, but upon the estate being sold at a period when it should not have been sold, the mortgagor disavowing any application, and the reports not having been made, which ought to have been before the sale. The order for sale therefore, and all the proceedings under it must be set aside. The money paid in must be repaid with interest, and the costs of the purchasers.

Ashhurst, Lord Commissioner.—No account has been taken of the personal estate, which ought to have been previous to the sale. It is an ingredient in this case that there is a gross inequality of price, but I do not rely upon that.

Hotham, Lord Commissioner.—I am of the same opinion. On a ground of policy the Court ought to be very slow in opening biddings, as much property is sold under the authority of the Court; but justice must not give way to policy. The circumstances of this case are so strong, as to make it difficult for the Court to get the better of them, and these cases must be decided upon their particular circumstances, as there is no principle that will pervade them all, unless the law of the Court were that we could in no case get at a bidding. This is of all others, is that which would demand the interposition of the Court.

Order for the sale, &c. set aside; but as the Lords Commissioners were not perfectly agreed upon the form of the order, the motion stood over (a).

This order was afterwards discharged by Lord *Thurlow*, with costs (b).

ALUI

(a) See this order from the Register's Book, 1 Cox, 36.

(b) It has been observed by *Eldon*, 14 Ves. 153; that Lord

Low, in the present case, and in *Scott v. Nesbit*, 3 Bro. C. C. 475, formed the rule upon the great case in Lord Gower's family, cit. sup. that after the confirmation of the report, unless there is some misconduct on the part of the individual who has the benefit of the confirmation, the Court will not open biddings upon negligence, surprise, or circumstances of that kind. In *Walsen v. Birch*, post, vol. iv. 171, S. C. 2 Ves. jun. 51, this doctrine was departed from by the Lords Commis-

sioners, but the orders made on that occasion have been repeatedly disapproved of, *Morice v. the Bishop of Durham*, 11 Ves. 57, *White v. Wilson*, 14 Ves. 151. As to the opening of biddings before confirmation of the report, vide *Upton v. Earl Ferrers*, 4 Ves. 700, *Chetham v. Grugeon*, 5 Ves. 86, *Tait v. Lord Northwicke* ib. 655, *Rigby v. Mucnamara*, 6 Ves. 117, *Andrews v. Emerson*, 7 Ves. 420, by which the old rule of accepting an advance of £10 per cent. is abolished.

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PRIDEAUX
v.
PRIDEAUX.

ALURED PINCKE, Esq. only Son and Heir at Law, and also the only acting Executor of ELIZABETH PINCKE, Widow, deceased, who was one of the Co-heiresses at Law of ELIZABETH HANDASYDE, Widow, deceased, and ANN THORNYCROFT, Spinster, the other Co-heiress at Law of the said ELIZABETH HANDASYDE - - - - - Plaintiffs.

EDWARD THORNYCROFT, Esq. only Son and Heir at Law, and also Devisee and sole Executor of HENSHAW THORNYCROFT, Esq. deceased, who was the Devisee and sole Executor of the said ELIZABETH HANDASYDE, deceased, and others - - - - - Defendants.

Lincoln's-Inn
Hall, 2d July,
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Lords Commis-
sioners, Lord
Loughborough,
Ashurst, Ho-
tham.

ELIZABETH HANDASYDE, the wife of the late General Handasyde, was in her life time seised of several estates in tail, under the marriage settlement of her father, Sir John Thornycroft, deceased, with remainder to Sir John Thornycroft junior, as heir to Sir John Thornycroft the elder, in fee. Sir John Thornycroft the son, by a will made in 1739, devised all his estates to Henry Foster in fee. This will was contested by Mrs. Handasyde as heir at law to the testator, and the suit compromised; on which Foster conveyed by deed all his claims to the late General Handasyde and Mrs. Handasyde, in fee. Mrs. Handasyde survived the General and made her will, dated 24th April, 1772, in which, among other estates, she gave her "estate and manor of Stockwell, in the parish of Lambeth, in the county of Surrey, and all thereunto belonging," to Henshaw Thornycroft, father of the defendant, and his heirs male; she also made Henshaw Thornycroft executor.—She died in 1772, leaving the plaintiffs her heirs at law.—Among the estates to which Mrs. Handasyde

Filing a bill for equitable relief is equivalent to bringing an action in its effect of preventing a fine from being set up as a bar, but filing a bill merely for discovery is not.

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Handasyde was entitled under the settlement, was one situate in the parish of *St. Mary, Newington*, in the county of *Surrey*, but which is not within the manor of *Stockwell*.—Of this, among the other estates, *Henshaw Thornycroft* took possession, and in *Hilary* term, 1773, with his wife, levied a fine and suffered a recovery in order to bar the estate tail. The title deeds of the estates were also in his hands as executor of *Mrs. Handasyde*.—*Elizabeth Pincke* (since deceased) and *Ann Thornycroft* filed their bill, praying a discovery of deeds relative to the estates, and also of what estates *Mrs. Handasyde* died seised, which did not pass by her will; and about *January* 1778, brought an ejectment against *Goater*, the tenant of the estate in *St. Mary, Newington*; but *Mrs. Pincke* then dying, and her claims descending upon the present plaintiff *Alured Pincke*, no notice of trial was given till just before the summer assizes, 1778. A few days before the trial was to come on, *Mr. White*, the solicitor for the defendant, informed the solicitor for the plaintiff, of the will of *Sir John Thornycroft the son*, and that the production of that will, and setting up the title of *Henry Foster* under it, would nonsuit the plaintiff in ejectment, but he did not mention the fine or the deed by which *Foster's* title was conveyed to *Mrs. Handasyde*, that deed being in fact not then discovered.—The heirs at law gave notice of trial for the *Lent* assizes, 1779, when *Henshaw Thornycroft* set up the fine and non-claim, and there having been no actual entry, the plaintiffs were nonsuited. Upon this the plaintiffs filed a bill of revivor and supplement, making *Mr. White* a party, praying that under these circumstances the defendants might be restrained from setting up the fine, and might account for rents and profits; which bill, upon the death of *Henshaw Thornycroft*, was revived against the present defendants.

The question before the Court was, Whether under these circumstances the plaintiffs ought to be barred by the fine.

For the plaintiffs it was contended, that they should have proceeded to trial at the summer assizes, 1778, which was before the expiration of the five years, if they had not been prevented by *Mr. White's* information of a title being out in *Foster*, which would nonsuit them;—therefore they contended this was a proper case for the interference of this Court.—They insisted further, that the filing of the bill in this Court was of itself sufficient to prevent the bar arising from the fine and non-claim taking place.—They cited 1 Vern. 73.—*Gilbert v. Emmerton*, 2 Vern. 503. *Baker v. Pritchard*, 2 Atk. 387.

For the defendants it was urged, that there was no impropriety in *Mr. White's* conduct.—That this Court would not interfere to prevent the operation of a fine, unless in cases of fraud; and that the bill being in substance a mere bill for discovery, could not operate to prevent the bar obtaining.—They cited *Lake v. Hayes*, 1 Atk.

1 Atk. 282.—2 Atk. 1.—*Mackenzie v. The Marquess of Powis*,
4 Bro. P. C. 328.—*Gradock v. Marsh*, 1 Ch. Rep. 205.—
Hurdret v. Calladon, 1 Ch. Rep. 214.—2 Ch. Ca. 217.—
Brereton v. Gamul, 2 Atk. 240.

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**Lord Loughborough.**—If it were made out that the plaintiffs were prevented from trying their cause by fraud, I should think, under the principles of this Court, the defendants ought to be restrained from setting up the fine as a bar; but here the plaintiffs take it for granted, that a bill filed in this Court for any purpose will prevent the statute of limitation or a fine barring.—All legal interests are bound by the fine: If the subject-matter of the suit be of legal jurisdiction, the bringing a suit in equity will not bar the operation of the fine.—If a demand of a debt be made here, if it be a legal debt, this Court being applied to for a discovery, will not prevent the statute of limitations from running; but if it be for payment out of assets, for which this is the proper jurisdiction, there the filing of the bill is the commencement of a proper suit. I do not say that a case may not exist, where the bad faith of parties may make a ground to prevent a fine from barring; but here was only a communication of the truth of the case; the attorney stated all he knew: it was not his duty to give notice of the fine. It is not in proof that it was in consequence of this they did not try the cause. It was their own judgment that decided upon it. A legal bar has taken place in consequence of a legal provision,—whether that provision be wise or not it must bind. No hardship has occurred, in consequence of which they can say that in conscience the fine should not be set up. This is a legal title, over which this Court has no jurisdiction, and no fraud has intervened. The bill must therefore be dismissed.

**Lord Commissioner Ashhurst.**—I am of the same opinion,—where a bill is filed, with a prayer for equitable relief, the policy of the law suspends the statute of limitation; just as in the case of the commencement of an action.—But with respect to a fine the case is different, the bringing an action is not sufficient to bar the operation without an actual entry; no more can the bringing a suit here be so, unless the entry was prevented by fraud. In any other case the filing the bill cannot prevent the bar; and in this case there was no fraud, but a fair disclosure.

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**Lord Commissioner Hotham.**—If the filing of the bill is not a sufficient bar, it will stand on the circumstances of the case. It was a mere bill of discovery, which is not sufficient. If the circumstances were such that there had been an imposition upon the party, I think the Court should interpose; but it was a fair candid conversation.

*Bill dismissed.*

This

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This decree was reversed upon appeal to the House of Lords 28th February, 1785 (a).

(a) For the proceedings in the House of Lords vide 4 Bro. P. C. Ed. Toml. 92. In addition to the reversal of the decree it was ordered that the plaintiffs should be at liberty to bring an action, &c. and that *Edward Thornycroft* should not insist on the fine and non-claim, &c. The case of the appellants, which is also in Mr. Cruise's Essay on Fines, 5 Dig. 260, contains a very able discussion of the doctrine upon this subject. For the case of *Bond v. Hopkins*, 1 Sch. & Lef. 413, Lord Redesdale, in one of the most luminous and elaborate judgments ever delivered, has entered into a full discussion of the cases in which a Court of Equity interferes to prevent an advantage gained at law from being used against conscience,

one mode of which consists in the party to try his title at law out the impediment which may conscience be opposed at law proceedings. A court therefore siding it against conscience the use of a fine levied pending a equity, will interfere as in the present case. And this principle is singularly established with reference well to the Statute of Fines and Statute of Limitations and the Statute of Frauds. *Mackenzie v. The Earl of Powis*, 7 Bro. P. C. Ed. Toml. Vide also *Pullensy v. Warren*, 79, and the observations of Manners in *Blennerhassett v. Deane & Co.* 104.

Lords Commissioners, Lord Loughborough, Ashurst, and Hotham.

Lincoln's-Inn Hall, 4th July, 1783.

Rent-charge devised to a wife, not a bar of dower, unless so expressed, or the circumstances such as to shew it must be so intended.

### PEARSON v. PEARSON.

THE testator gave by his will ten acres of land to his widow subject to a rent-charge of £10 *per annum* to his wife, and £5 a year to his brother. The bill was filed by the widow for the annuity and her dower; and the only question was whether the rent-charge to the wife was a bar of her dower, being so expressed in the will. Mr. Kenyon and Mr. Lloyd Lawrence v. Lawrence, Eq. Ab. 218, 219. (1 Bro. P. C. Ed. Toml. 92.) *Davis v. Edwards* (before Lord Bathurst) that rent-charge not bar dower, unless so expressed. On the other side was *Villa Real v. Lord Galway*, before Lord Camden. (Hail Lit. 36 b.)

Lord Loughborough.—The law is perfectly settled, and plain. The gift of an annuity to the wife may be a bar of dower, or may not, according to the language of the will: *see v. Kempstead*, (cited in the same note upon Co. Lit. 36 b.) In *Villa Real v. Lord Galway*\*, it was held to be a bar, but not otherwise.

\* The Reporter having been favoured with a very accurate note of Lord Camden's judgment on the point of dower in this case (in which the forms on the subject are considered) he has added it here.

Lord Chancellor stated the testator Mr. Villa Real's will to be as follows: "I give and devise to my dear wife one annuity or clear yearly sum of lawful British money, to be paid her by two equal half-yearly payments which annuity I give her during her natural life," &c. And subject

(a) Since reported 2 Eden, 236. S. C. Amb. 466.

otherwise the other devises in the will could not take effect. In this case, if the value of the lands should not be sufficient to satisfy

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payment of the said yearly annuity or yearly sum of £200 to my wife during her natural life, I give and bequeath all and every my messuages, cottages, &c. &c. and also my personal estate as hereinafter mentioned; i. e. "I give and devise," in words comprehensive of all his real estate, "to trustees and their heirs, in trust to preserve and support the contingent uses and remainders from being defeated and destroyed, and for that purpose to make entries; yet nevertheless to permit and suffer my daughter or her trustee hereinafter mentioned, to receive and take the rents and profits of all and singular the premises to and for her proper use and benefit, and to let, set, and demise the same for the best rents, without taking any fines for her natural life, and then in trust for the use and behoof of the heirs of the body of my said daughter, and in default of such issue remainders over.

All the rest and residue of my ready monies and personal estate to Lord Galway in trust, to vest the same in the purchase of lands, to be conveyed to the trustees in trust, for the same uses as before limited of his real estates.

If the annuity be behind or unpaid, his wife to enter on the said estates, or any part thereof, or into any estates to be purchased, to distrain, &c. till arrears are fully paid and satisfied."

The questions upon this will :

1. Whether Mrs. *Villa Real* is to take this annuity in satisfaction of dower out of her husband's real estate :

2. Whether Mrs. *Villa Real* is entitled to this annuity clear of the land-tax.

At the hearing of this cause two cases were relied upon by each side upon the first point :

The first, the case of *Pitt v. Snowden*, determined by Lord Hardwicke, where, upon a like will, he determined the widow to be entitled both to dower and annuity :

The other, the case of *Arnold v. Kempstead*, where Lord Northington, in a similar case, was of opinion that the widow was entitled only to one, and put to her election.

*Pitts v. Snowden* was thus: Devise to his wife of an annuity of £50 a year payable out of his copyhold and his freehold messuages, with clause of entry and distress, to be made good out of his personal estate. And, subject to the annuity, he gave his freehold messuages to his three children, &c.

*Arnold v. Kempstead*. Testator gave some leasehold estates to his wife for life, and then gave his wife £10 a year, (£20 whereof to be paid within twelve months after his decease) to be paid to her yearly during her natural life, or so long as she should continue a widow, out of the rents and profits of his freehold estates in *Queen's Square*.

No clause of entry and distress.

But gave all his freehold estates in *Queen's Square* to his son, with remainders over.

The case now before the Court is more exactly correspondent in the form of the devise to *Pitts v. Snowden* than to the other case; for in these two there is an express clause of entry and distress, whereas there is no such power in *Arnold v. Kempstead*; and they more perfectly resemble each other in another circumstance, as the annuity in both is charged upon other funds not subject to dower, as well as upon the dowable estate; whereas in *Arnold v. Kempstead* the annuity is made to issue only out of the freehold estate subject to dower.

These two being alike in all their circumstances, I must admit that *Pitts v. Snowden* is an authority in point one way, *Arnold v. Kempstead* the other.

The question upon this case is this :

1. Whether if a rent-charge is given to the widow, issuing out of the estate subject to dower with power of distress, this devise shall operate as a bar or satisfaction of her dower.

I am of opinion that it shall, because the claim of dower first disappoints the will, and second is inconsistent with it.

It

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satisfy the two annuities and the dower it would prove it was intended to be in bar, otherwise there is nothing in the will to shew such

It is admitted that every devisee must confirm the will *in toto*, if he claims any interest under it; and will consequently forfeit such interest if he impeaches or intercepts any part of it.

In this case the will is contradicted by the claim of dower. First, Because it puts the trustees out of possession; for they cannot hold the whole, subject to the annuity and distress, without being in possession of the whole: nor can the annuitant, consistent with the will take possession of any part, because her right of entry into the whole puts her out of possession of the whole, till her right of entry accrues upon default of payment.

And though the present case gives the right of entry upon the whole, or any part in more explicit terms than *Pitts v. Snowden*, yet the general power of entry and distress in *Pitts v. Snowden*, is tantamount in this particular.

The position therefore of the trustees, being co-extensive with the annuities and the distress, it is not possible in such a case to make the land subject to the dower and the rent-charge at the same time, because

As annuitant the widow must be out of possession of the whole; as dowress she must be possessed of a part.

Hence it follows, that where the testator gives the estate subject to the annuity, as he doth in this case, he must be intended to give subject to the annuity *only*, and the residue of the rents and profits being given to the devisee, that devise must exclude all charges, except only the annuity.

In this view of the matter, the widow by the claim of dower disappoints the will in the most essential part of the testator's plan, by reducing the interest of the devisee, and loading the estate with an additional burthen.

2. The claim of dower, is inconsistent with the will in another light, as it will diminish the annuity itself, which is contrary to the very words of the will.

The annuity is either given over and above the dower, or in satisfaction of it. He intended only one, or he intended both, if both, he intended both should be enjoyed in their full extent; the whole annuity and the whole dower,

Now can the widow enjoy the annuity as the will has given it if she claims her dower?

It is most clear that she cannot:

For if she enters into a third right of her dower, she must sink so much of her annuity as that third ought to bear in proportion. *That is a violation of the will*, and whether the annuity clashes with the dower, or the dower with the annuity, it is equally decisive, for she can never enjoy both, unless both can be reconciled to the will:

Nor is there any pretence to say that the whole annuity, by an equitable marshment, shall be thrown upon the two remaining thirds; because that would in terms contradict the will, which charges the whole, and gives the power of distress on the whole.

This is sufficient to shew the testator's intention; it is an intention that does not stand upon a loose presumption, but from the mode of devising in the will itself;—and then the case comes within the rule of *Noys v. Mordant*, that no person shall dispute a will that takes under it.

This rule is universal and without exception; and a dowress has no more right to be exempted from it, than any other devisee.

The cases of *Lawrence v. Lawrence*, *Hitchen v. Hitchen*, *Lemon v. Lemon*, &c. may be all admitted to be good law; the will in all these cases being consistent with the claim of dower.

In all these cases the dowable estate was devised generally; and as the testator had not expressed the wife's bequest to be in satisfaction, the Court would not presume it, and the estate passed *cum onere*.

There no violence is done to the will; and the wife takes no more from the devisee than the testator intended she should; nothing being declared to the contrary.

But where the dowable estate is so divided that the claim of dower makes a material change in the will itself, as it does here, the widow must be barred by necessary implication. For where is the difference between declaring she shall not hold both, and devising so that she cannot hold both without disturbing the will?

And



such intention; and there must be such an intent to make it a bar to dower.

The cause stood over in order to enquire into the value of the land; plaintiffs' counsel agreeing, that if it should not be sufficient to answer the annuities and the dower, the widow should relinquish her claim (a).

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And therefore if the claim of dower will disappoint the will, she is barred of her dower by necessary implication; which will, according to the doctrine of all the cases, be equivalent to an express declaration.

I will now say a word upon the case of *Arnold v. Kempstead*.

There is no power of distress in that will, and yet I do think it substantially within the reason of the other two cases; for the very gift of an annuity to the wife out of the dowable estate does, from the nature of the interest, throw her out of possession, and makes the claim of dower inconsistent with the will.

I must not conclude without taking notice of a circumstance that may be urged against my opinion, as a proof of intention in the testator to give both dower and annuity to the wife; and that is, that the annuity is made to issue out of more than the dowable estate, from whence it may be argued that the testator enlarged the fund for payment in order to leave sufficient for the satisfaction of both the demands.

I answer, First, That it is totally unknown whether he extended the charge and the remedy with that view; it is at most but conjecture, and it may as reasonably be supposed that he meant only, by augmenting the security, to give an easier and safer remedy for recovering the annuity, as nothing is more common, where a rent-charge is granted, than to charge an estate of ten times the value for the payment of it.

Secondly, That this supposed intention is rebutted by a declared intention to the contrary, manifested and expressed in the will itself.

I wish these cases could have been reconciled, feeling in myself a modest unwillingness to sit in judgment upon two men greatly superior to myself in learning as well as capacity; but that which in a private man would have been presumption, is an indispensable duty in a judge; the task is imposed upon me by my office, and I undertake it with more ease of mind, knowing that there is a jurisdiction superior to us all, which is able to confirm or reverse my opinion by a final decision.

(a) The substance of the following note was subjoined by the Editor in a note to the case of *Arnold v. Kempstead*, 2 Eden, 236, as he believes it to contain a correct statement of the present doctrine upon the subject, it is here inserted, with the proper alterations.

The general doctrine on this subject upon which all the cases agree, has been stated as follows: The right to dower being in itself a clear legal right, an intent to exclude it must be demonstrated by express words, or by clear and manifest implication; the instrument must contain some provision inconsistent with the assertion of the right to demand dower. Vide cases, cit. sup. *Strahan v. Sutton*, 3 Ves. 249. *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. *Lord Dorchester v. Earl of Effingham*, Coop. Ch. Rep. 319, and cases post. There has, however, been a considerable difference of opinion as to the application of this rule to the case of a

devise of an annuity to the widow, charged upon the real estate. The first case in which the question arose (for the early cases merely decided that the gift of an estate to another person did not exclude the wife from claiming dower,) was that of *Pitts v. Snowden*, before Lord Hardwicke, cit. sup. His Lordship there held, that a devise to the widow of an annuity, with a clause of entry, did not bar her of dower. This was followed by *Arnold v. Kempstead*, in which Lord Northington determined against the claim of the widow; but it does not appear that *Pitts v. Snowden* was cited: it is indeed most probable that it was not, as his Lordship would hardly have over-ruled the decision of so great an authority without having noticed it and stated his reason. The next case was *Villareal v. Lord Galway*, (Amb. 682. and more fully reported supra.) before Lord Camden, His Lordship having the two con-  
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dicting authorities before him, adopted the opinion of Lord *Northington*, and was afterwards followed by Sir *Thomas Sewell*, in *Jones v. Collier*, Amb. 730. and Mr. Justice *Buller*, in *Wake v. Wake*, post, vol. iii. 255. S. C. 1 Ves. jun. 335. The opinion of Lord *Hardwicke*, on the other hand, in favour of the claim to dower, has been adopted by Lord *Rosslyn*, in the principal case, by Lord *Tharlow* in *Forster v. Cook*, post, vol. iii. 347. and received considerable countenance in the elaborate judgment of Lord *Alvanley* in *French v. Davies*, 2 Ves. jun. 572. His Lordship however did not go the length of giving any determination upon the subject, that case only deciding that an annuity claimed out of a mixed fund composed of the real and personal estate did not bar the widow. The last case upon this point is *Greastorex v. Cary*, 6 Ves. 615. which however did not meet with a very full discussion. In that case,

the like point as to the claim on mixed fund, was again decided in *Alvanley* in the same manner.

Though the number and weight of these authorities are thus nicely balanced, yet it seems probable both from the more recent date of the decision in favour of the claim to dower, and from the language which the Court has used in those and similar cases, a stronger indication of intention now be required in order to prevent a widow to her election, than the devise of an annuity with a power of entry to enforce the payment. This conclusion also derives great support from the late decision, that a claim to dower is not barred by a devise to the widow of land for life if it is part of the same estate out of which she claims dower. *Birmingham v. Lord Dorchester v. Earl of Ham*, ante.

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Devise to trustees to invest in stock and pay dividends to testator's son for life, and after his decease to his eldest son and his heirs for ever, and in case of their death without issue, to his (testator's) nearest relation, and the nearest relations of such nearest relation for ever. 1st. This is a double contingency, and, in the event of the son dying without issue, is good. 2d. It goes to the person who was nearest relation at the time, the half-sister; though there were living representatives of a person as near, viz. a half brother.

## MARSH v. MARSH.

**MILBOURNE WARREN** made his will, and ordered his personal estate to be laid out in the purchase of stock, that the trustees should pay the interest, &c. to his son *W. Warren* for life, and from and after his decease to his eldest son and his heirs for ever; and in case of their death without issue to his (the testator's) nearest relation, and to the nearest relation of such nearest relation for ever. At the time of making the will the testator lived separate from his wife.—He had only one son who was unmarried (and who afterwards died in the life of his father) he had a half-sister, the plaintiff: and there were also alive children of a deceased half-brother, who, with the testator's widow, were the present defendants.

Mr. *Madocks* and Mr. *Brown*, for the plaintiff, insisted that under the description of nearest relation, no single person could take but the half-sister, she being nearer than the son of the deceased brother. The wife cannot take under the description of a relation. *Worsley v. Johnson*, 3 Atk. 758.

Mr. *Scott*, for the widow.—The claim of the widow must be supported on other grounds.—She contends, that the contingency upon which the property is given to the nearest relation is too remote, and that the testator has died therefore intestate, and the estate is to be distributed, of which she claims her own share, and also that of the deceased son, as his representative.—The question therefore

whether this is to be considered as a single contingency too remote to take place, or a double contingency, one part of which not having happened, the other is good : as if the devise had been to his son, and after his decease, to his eldest son, if he should have one, if not, then over.—But that intent is not expressed here any more than in *Clare v. Clare*, For. 21. where Lord Talbot said that it could not be altered by the subsequent event.—*Stanley v. Leigh*, 2 P. W. 618. the only case against it was over-ruled by the case of *Clare v. Clare*.—*Burgess v. Burgess*, 1 Mod. 114.

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Mr. Selwyn and Mr. Hood, for the children of the half-brother, cited *Higgins v. Dowler*, 2 Vern. 600.—*Stanley v. Lee*, as cited For. 23. They contended if there had been five or six persons in equal degree, that they must have taken equally, there could be no preference ; that in this, as in every case where the testator has used such words that the Court cannot give them a construction, it will let in the next of kin.—In *Whithorn v. Harris*, 2 Ves. 527. such relations only were held to be within the description as were within the statute of distribution, 2 Ch. Rep. 77. *Thomas v. Hole*, For. 251. *Green v. Howard*, (ante, 31.)—Where there is a doubt the Court always leans in favour of the next of kin. *Sheffield v. Lord Orrery*, 3 Atk. 282.—and this goes in exclusion of the wife. *Worsley v. Johnson*.

Lord Loughborough, Lord Commissioner.—The testator did not mean to restrain the interest of any one but his son: If the son had a son, that son would have taken the whole from his birth.—It is a clear double contingency, one way good the other not so (a). Upon the decease of *William* without issue, the remainder over was good.—There is no affectation of a perpetuity. The devise is “to my nearest relation, and the nearest relations” of my nearest relation ; the nearest relation at the time was the half-sister (b). If there had been more persons in the same degree there must have been a division, because each would have been nearest relation.

*Ashhurst*, Lord Commissioner.—It is a contingency with a double aspect : In the event that has happened, it is lawful.—He meant that whoever happened to be his nearest relation at the time of the event should take, not any representative.—It is therefore clear in favour of the plaintiff.

*Hotham*, Lord Commissioner.—Of the same opinion.

*Decree for the plaintiff.*

(a) As to this vide *Fearne*, C. R. 372. et seq.

(b) See a similar decision in a case of *Smith v. Campbell*, cit. 1 Mad. Rep. 37.

which was said to have been determined upon principle, the Court not having been aware of the present case.

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18 Serj. Hill's  
MSS. 65.

1 Cox, 37.

23d March, 1782,  
before Lord  
Thurlow.5th July 1783, be-  
fore Lords Com-  
missioners  
Loughborough,  
Ashurst, Hotham.

Bond, condition-  
ed that executors  
pay £5,000 to a  
natural son at 21,  
(if he should at-  
tain that age); by  
will afterwards  
the father gave  
£15,000 to trus-  
tees to pay £200  
per ann. for the  
maintenance of  
the son till 25, and  
then to pay him  
the principal; and  
if he should  
marry between 22  
and 25 and die, to  
pay the whole to  
the issue; but if  
he died unmarried  
before 25, the  
whole over. This  
devise is not a sa-  
tisfaction of the  
bond.

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## JEACOCK v. FALKENER.

**T**HOMAS CROWDER in 1764, entered into a bond to trustees, reciting that he was desirous of providing for one of the defendants, *Thomas Crowder*, his natural son, then about four years old, and conditioned that his executors should, six months after his decease, pay the sum of £5,000 to the trustees for the use of the said *Thomas Crowder*, the interest to be applied for his maintenance and education till twenty-one, and the principal then to be paid to him; but if he should die, living the father, or under twenty-one, then not to be paid.—In 1778, *Crowder* made his will, whereby he gave the defendants, the trustees, all his estates in trust to pay legacies, and to lay out £15,000 on securities, and to apply £200 per annum to the education of *Thomas Crowder* till twenty-five, and then to pay to him the £15,000; but if he should marry between twenty-two and twenty-five, and should die, to pay the whole to the issue; and if he should die unmarried before twenty-five, he gave the whole over; the residue, so far as £15,000 to *Caleb Jeacock* for life, remainder to his children; but if the residue should exceed £15,000, then half the surplus to go to *Thomas Crowder*, the other half to the *Jeacocks*.—The bill was filed by the *Jeacocks*, praying that the legacy given to *Thomas Crowder* by the will, might be declared to be in satisfaction of the sum secured by the bond.

The cause was heard 23d April, 1782.

Mr. *Mansfield*, for the plaintiff.—These are portions for the maintenance and education of this young man. Where *Crowder* is disposing of his whole fortune, he seems to have equal intent to provide for the *Jeacocks* by an equal distribution of his fortune. The circumstance of these two sums being for the same purpose, is sufficient to make one a satisfaction for the other. *Copley v. Copley*, 1 P. W. 147. *Clarke v. Sewel*, 3 Atk. 96. *Lee v. D'Aranda*, 3 Atk. 419. 1 Ves. 323. Eq. Abr. 203.

Lord Chancellor.—Those cases do not apply, they are cases where legacies are adeemed by subsequent acts.

Mr. *Mansfield* offered to read evidence to prove a conversation between the testator and one of his trustees, in which he mentioned his intentions respecting the provision for *Thomas Crowder*. This being objected to, he cited 2 Vern. 593. 1 Ves. 323. 3 Atk. 77. as cases where such evidence had been allowed.

Lord Chancellor.—Evidence cannot be read to prove what the testator meant by the words used in his will, but it may as to facts upon which the testator made his will.

Mr.

Mr. *Lloyd*, on the same side, cited the case of *Errington v. Broughton*, in the House of Lords, (Bro. P. C. 12.) where the attorney's evidence of Sir *Brian Broughton's* declaration of his intention at the time of making his will, was allowed.

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Mr. *Attorney-General* for the defendants, cited *Brown v. Selwyn*, For. 240.

*Lord Chancellor*.—If this evidence be offered to explain the will, I must reject it; if otherwise, I must consider it further.

Mr. *Mansfield* gave up the point of evidence.

*Lord Chancellor*.—The rule is, that where portions are charged on an estate which will go to the eldest son, additional portions on condition shall be like laws made after others, and repeal the former; but there is no case where such a provision as this has been so held. Here the bond is the original gift; then the will provides for that only child and other relations.—He chose to give it to the child until he should be twenty-five years of age; but he gives it over as effectually if he dies without issue between twenty-one and twenty-two as if he died before twenty-one. The intent of the testator, collected on fair grounds that the party should *not* have *both*, is the only ground on which such a decree can be made. The bond here is not satisfied by the legacy; the £15,000 must therefore be applied to the trusts of the will.

This cause was re-heard before the Lords Commissioners, 5th July, 1783. The argument was little more than a repetition of the former, and the same cases were again cited. Immediately upon the close of the argument the Lords Commissioners gave judgment.

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*Lord Loughborough*.—Though *Crowder* gave the legacy payable at twenty-five, with a supposition that the legatee might marry at twenty-two with consent, in case of his death before twenty-five without issue it sinks into the residue. The next object of his bounty was the family of *Jeacock*; he gives them the residue, but if that should amount to more than £15,000, the surplus was to be divided between them and *Thomas Crowder*. Long before this time the bond was given for £5,000 payable to *Thomas Crowder* at twenty-one. It is contended he was not to have this £5,000 on account of the legacy given by the will. In order to this they should shew an intent that he should not have the £5,000.—They have raised an idea that the testator meant an equality between *Crowder* and the *Jeacocks*, but no such idea prevailed; for *Crowder* was certainly to have £15,000, so that the circumstance is not made out. It would be difficult to shew that the testator recollected the

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the bond and meant to satisfy it. There is a strong circumstance in the case to shew that he did not mean this, for in a legacy to his housekeeper in the same will, he expressly gave it in satisfaction. As to the case of portions, and the Court saying that parties shall not take double portions against a general representative either in land or money; here they are not portions, but *Crowder's* share is to be made equal if there is more than £30,000. It is taking the *precipuum*, not a part out of it.

*Ashhurst*, Lord Commissioner.—The testator knew that where a legacy was to be a satisfaction it was necessary to say so.—Here the legacy, if considered as a satisfaction, might have been a detriment, as it was not payable till twenty-five, and the bond was payable at twenty-one.

*Hotham*, Lord Commissioner,—concurred.

Lord *Thurlow's* decree affirmed (*a*).

(*a*) Vide *Grave v. Earl of Salisbury*, post, 425, and as to the doctrine upon the satisfaction of debts by legacies, Mr. Cox's note to *Chancey's* case, 1 P. W. 409. 2 Roberts on Wills, 5. *Wallace*

v. *Pomfret*, 11 Ves. 542. As to satisfaction of covenants to provide for a wife, vide *Haynes v. Mico*, ante, 129. of covenants to provide for children, *Warren v. Warren*, post, 305.

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18 Serj. *HUT's*  
MSS. 61. 178.

### MONKHOUSE v. HOLME.

Lords Commissioners, Lord *Loughborough*, *Ashhurst*, *Hotham*. Testator gave the use of £800 to his wife for life, and after her decease made a disposition of parts of the principal; he then gave several other devises, and afterwards to J. M. £100. J. M. died, leaving the widow, held that his legacy was vested and transmissible.

**JONATHAN MONKHOUSE**, by will dated 14th April, 1761, gave to his wife the use, interest, and produce of £800 during her life, to be raised out of his personal estate; and from and after her decease gave and disposed of the said sum of £800, in manner following; that is to say, to *Letitia Ball* £100, to *Mary Monkhouse* £200, to *Edward* and *Charles Holme* £100 each, to *Mary Hall* £5 a year. Then followed other devises, some of real, some of personal estates; among others, to a servant £5, and then the legacy on which the question arose. *I also give to Jonathan Monkhouse, son of my brother George*, the sum of £100. He then gave the rest and residue to his wife. The nephew, *Jonathan Monkhouse* (legatee of the £100) died in June 1771. His father administered to him, and the plaintiffs are his representatives. *Elizabeth*, the widow, lived till October 1779, and made the defendant her executor.—The bill was filed for the £100 legacy.

Mr. *Selwyn* and Mr. *Scott* for the plaintiffs, contended, first, That this legacy of £100, was not part of the £800, or second, if it was so, still it was a vested legacy in *Jonathan Monkhouse*,  
the



the nephew, and transmissible to his representative. They argued the first point from the intervening legacies, but relied little upon it, principally relying upon the second point, that it was a reversionary interest, vested at the death of the testator, and only postponed to give the widow the use of the fund during her life; and cited 2 Eq. Ab. 548.—*Kemp v. Davey*, (ante, p. 120, note.)—*Pawsey v. Edgar* (ante, p. 191, note.)—*Dawson v. Killet* (ante, p. 119)—*Morgan v. Gardener*, in the Exchequer (ante, p. 193, note.) 1 Ves. 208.—*Barnes v. Allen* (ante, 181.)—1 Ves. 44.—1 P. W. 566.

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Mr. Kenyon, Mr. Arden, and Mr. Lloyd, for the defendants, contended, that the plaintiffs had themselves put upon this legacy the construction of being part of the £800, never having filed their bill till after the death of the wife; that there was a direction after this legacy in the will, to apply the £800 to the foregoing legacies, and that this supposition raised the general question.—The cases of real estate should be put out of the question, an uniform distinction having been taken between them and cases of personalty.—This disposes of *King v. Withers*, and *Hutchins v. Foy*; upon which last *Killet v. Dawson*, and *Kemp v. Davey* depend, but wherever the legacy arises out of personalty, the rule is, that if it is given by words *de futuro*, the legatee must live to the time in order to take; though if the gift be by words *de presenti* to be paid *in futuro* it vests. This rule is laid down in 1 Eq. Ab. 295, and has obtained ever since. In *Norris v. Huthwaite*, in the Exchequer, (ante, 182, note.) it was, *at the decease of my wife, or if she marry, I then give £500 out of the fund to my sister*: the sister died in the life of the wife.—Mr. Baron Eyre laid down the law, that it was not a case of contingency, nor did it depend upon its being a mixed fund, because the personalty was sufficient, and the real estate only collateral. It must be determined upon the rule of law, the time of the gift being future, and the party dying before the event happened, the legacy lapsed.—In *Smith v. Salmon*, Exchequer, 23d June, 1778, it was *to lay out £500 on land or in stock, and pay the yearly interest to testatrix's sister, and from and after her decease, she gave and bequeathed £100 thereof to Margaret Smith*, who died in the life of the sister; the Court held the legacy was lapsed. In the case of *Barnes v. Allen*, the words were immediate, though the distribution was future.

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The cause stood over till the 7th July, when judgment was given.

Lord Loughborough.—Two points have been contended. First, That this is a single legacy, payable out of the assets, not an *ali-quot* part of the £800. As to that, though it is not clear from the penciling of the will, yet it is contrary to the sense of the parties, and

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and the apparent intention of the testator. The second is, that if part of the £800, it is lapsed by the death of the legatee. The £800 is a gift to the trustees, to pay the interest to the wife for her life, and then in parts and shares. That shews his intent to be to give a vested interest to the several legatees. But this is said to be contrary to the rule of not vesting legacies given by words *de futuro*. I rather take the rule to be, that where the time is annexed not to the form, but to the substance of the gift, there it lapses by the death of the legatee. There are instances both ways in *Dyer*, 59 b. on the will of Lord *Latimer*. The rule in legatory cases is taken from the civil law. It is of importance that the rule should be the same in both courts; there is much upon it in *Swinburne*, 30, 34, with various limitations and exceptions, but there is little precision in it: but the authorities there cited, upon being examined, clear the matter. The Digest, L. 36. tit. 2. L. 21. *Si dies* says *si certa sit dies legati, statim cedit; si incerta, nisi tempus obtigit, neque res pertinere, neque dies legati cedere potest(a)*. If the day is certain, it is vested; but where uncertain, the true question will be, “whether it is the nature of a condition,” for if it is conditional, then, in the very nature of the thing, the time is annexed to the substance of the gift, as in the case of marriage, of puberty, or of any other situation of life; when the arrival of the time is a condition, without which the testator would not have made the gift. In *Cloberry’s* case, 2 Vent. 342, Lord *Nottingham* said, the giving interest shews no contingent legacy was intended. The anonymous case in 2 Vent. 347, approved in *Pinbury v. Elkin*, 1 P. W. 566, I take to be good law; the limitation over was not in the nature of a condition. *Corbet v. Palmer*, 2 Eq. Ab. 548, is to the same effect. In *Lowlands v. Stephenson*, in the Exchequer, 1773, the legacy was held to be vested. In *Killet v. Dawson*, before Lord *Thurlow*, it was not a condition, but held to be vested: *Barnes v. Allen*, was to the same effect. *Norris v. Huthwaite*, in the Exchequer, a few years ago, was cited against this; but if the note that was read was taken accurately, I do not agree with the rule there laid down, that a legacy given in future, where the legatee dies before the time lapses; but where the time is annexed to the substance of the gift, as I before said. *Smith v. Salmon* is not a case from which one can reason; the penning of the will was extremely special, and the Lord Chief Baron has told us the determination went on the special penning of the will(b). There is a case which has not been cited, which is stronger for vesting than most of those which have been cited. It was in the House of Lords, in 1727, and is correctly stated in *Mr. Brown’s Cases* in Parliament, upon an appeal from Lord

(a) See all the passages upon this point in the Digest given at full length in *Hanson v. Graham*, 6 Ves. 245, in Sir *W. Grant’s* very able judgment.

(b) These two cases were over-ruled in *Benyon v. Maddison*, post, vol. ii. 75. and *Molesworth v. Molesworth*, post, vol. iii. 6.

King,

*Love v. L'Estrange*, 3 Bro. P. C. 337.) that the words annexed to the gift was very clear; but the probable determination is, that it was a residue (a). One might expect a different determination if it had been the case of a legacy. The circumstance of introducing a legatory by the word "after" cannot be construed so to affect it to make it a condition. The solid substantial distinction whether the testator meant it as a condition. This cannot be used as making a new rule of law. The rule (which I think that of the civil law) not being broke in upon, but allowed to be construed as it was by Lord *Talbot*, Lord *Hardwicke*, and Lord *Erskine*. We are all of opinion that the legacy vested, and must be paid from the death of the wife\*.

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uses of *Holecroft v. Phittion*, at the Rolls, May 24, 1784, and *Benyon v. Benyon*, (post, vol. ii. p. 75.) support the doctrine of this case, with which the point. There has been a subsequent case in the Exchequer, *Hamil- ton v. Hamilton*, 18th of June, 1787, which has received a similar decision; and where *Norris v. Huthwaite* was again reprobated. Vide also *Scurfield v. Scurfield*, vol. iii. 90.

of the cases upon this subject have been actually decided: distinction between a general legacy. Lord *Almon* in *Booth v. Booth*, 4 Ves. 248, that he thought there might be a distinction, but both his Lordships, and Sir *W. Grant*, in the present case of *Hanson v. Grant*, 248, observed, that it was

not necessary in *Love v. L'Estrange* to resort to that circumstance; the determination being fully warranted by the decision in *Doe v. Lea*, 3 T. R. 41, and the principles laid by Lord *Mansfield* in *Goodtitle v. Whitby*, 1 Bur. 228. For the general cases upon this point, vide the Editor's note to *Killet v. Dawson*, ante, 119.

1. The Earl of PEMBROKE and Others, Trustees, and Lord Viscount BOLINGBROKE.

Manor of *Beckenham* in *Kent*, was vested in trustees with power to sell, laying out the money to the uses under a settlement by which Lord *Bolingbroke* was entitled to a life estate, the remainders over. Lord *Bolingbroke* had granted rent of the estate to *Hans Wintrop Mortimer*, Esq. and Mrs. The trustees, with Lord *Bolingbroke*, afterwards sold the estate (without notice of the rent charges) to *Cator* the plaintiff, and Lord *Bolingbroke* covenanted that the premises were free from all incumbrances. The trustees invested the purchase money in annuities. Lord *Bolingbroke* granted the annual dividend of his life to *Boldero*, one of the defendants, with power that the money should not be laid out in land for his life-time; and the trustees gave him a letter of attorney (irrevocable) to receive the dividends. *Boldero* knew that the annuities were the purchase money for the estates sold, but knew nothing further of the circumstances. He afterwards evicted *Cator*, who filed the present bill to

Lords Commissioners, Lord *Loughborough*, Lord *Ashurst*, and Lord *Hotham*.

Purchaser, without notice of a rent-charge, transfers stock in payment; the party entitled for life grants an annuity out of the dividend, secured by a letter of attorney to receive the dividends, to a person who had not notice of the transaction; the purchaser of the estate is evicted by grantee of the rent-charge, he has no lien on the stock.

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have the *South sea* annuities re-transferred, insisting he had a lien upon them.

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Mr. *Kenyon* and Mr. *Hollist*, for the plaintiff.—Where a purchaser does not pay the purchase money, the vendor has a lien upon the estate. This principle applies to the present case. *Cator* would have a right to follow this stock against Lord *Bolingbroke*: and the legal estate in it is in the trustees. If the legal estate had been in *Boldero*, the Court might have refused to take away the *tabula in naufragio*; but as it is, the Court will look to the elder title. In exchange, the very act includes a warranty, and the person who conveys, and is evicted, may bring a *warrantia charta*. Here Lord *Bolingbroke* gives land, *Cator* money; if there had a total eviction, *Cator* had a right to have his money back; for the estate would be worth nothing. *Eton College v. the Bishop of Winchester*, 3 Wils. 468. and there can be no difference as to a partial eviction. If this be so at law, why not also in equity? Ought *Boldero* to keep the money which *Cator* has paid for the manor of *Beckenham*? The legal estate being in the trustees, and the stock not conveyed, *Cator's* prior title must prevail. *Boldero* knew the money was the purchase of settled estates. His whole title is an equitable one, to take the dividends during Lord *Bolingbroke's* life. Mr. *Cator* having a prior equity, the decision must be in his favour; and the trustees be decreed to give him a power of attorney to receive the dividends. Mr. *Cator* bought the manor at the full value of the estate at the time. Mr. *Boldero* bought the dividends at seven years and a half's purchase, and has had them eight years; so that, in point of consideration, Mr. *Cator* has also a better claim:

Lord *Loughborough*, Lord Commissioner.—The principle, in case of purchase money remaining unpaid, is the same as in the case of an exchange; the estate remains subject to the vendor's right to his money against the heir, if the purchaser is dead, or against a third person, to whom he has made a legal conveyance: but if that person has paid the value of the estate, it becomes a question whether it was with or without notice of the first vendor's claim.—If, by recital, the title is deduced from the first vendor, still that will not be sufficient to affect him, for that does not shew it was not paid for.—That is precisely the case here; *Boldero* had only notice that it was money paid for a settled estate. It is said *Boldero* has no legal title; but that is nothing to the case. He has got an advantage, of which he is in possession by the letter of attorney from the trustees, and both *Cator* and he being unfortunate, and he having an advantage which does not affect the integrity of his mind, the Court could not relieve *Cator* without injuring *Boldero*.

Ashhurst,

Ashurst, Lord Commissioner.—I am of the same opinion. *Boldero* has a letter of attorney irrevocable, from Lord *Bolingbroke* and the trustees, so that he is in possession; and although he had notice of the annuities being the purchase money for the estate, he had no notice of the eviction.

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*Hotham*, Lord Commissioner.—I am of the same opinion; the notice does not go far enough to affect *Boldero*. It is only that it was purchase-money.

*Bill dismissed without Costs\*.*

\* This order of dismissal was affirmed on a re-hearing before Lord *Thurlow*, 18th December, 1787. Vide post, vol. ii. p. 282.

### LAWSON v. BARKER.

**B**ILL filed by the creditors of *George Lewis Scott*, Esq. against the defendant, the executor, without making the residuary legatee a party.

Lord *Loughborough* thought he ought to have been a party, as being interested, to resist the demands, and because, otherwise, the residuary fund might be exhausted by collusion.

But Mr. *Ambler* and Mr. *Madocks* (as *amici curiæ*) said, That the practice was not to make the residuary legatee a party. And Mr. *Graham* (who was in the cause) said, he had examined, and that it was unnecessary even where the bill was by a legatee, referred to, 1 Eq. Ab. 73, pl. 13.

Lord *Loughborough* observed, if this was so, it was an anomalous case, in a Court of equity, where all parties who are interested are to be before the Court.

But the decree was taken as prayed †.

† Same point, so held in *Love v. Jacomb*, Hil. 1776 (a).

(a) Vide *Wainright v. Waterman*, 1 Ves. jun. 313. *Brown v. Douthwaite*, 1 Mad. Rep. 446.

Lords Commis-  
 sioners, Lord  
*Loughborough*,  
*Ashurst*, and  
*Hotham*.

In a bill against  
 the executor,  
 either by credi-  
 tors or legatees,  
 it is not necessary  
 to make the resi-  
 duary legatee a  
 party.

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S. C.

1 Cox, 38.

Lords Commissioners, Lord Loughborough, Ashurst, and Hotham.

Lincoln's-Inn Hall, July 16.

Personalty given to trustees to pay dividends, &c. to R. at 28, or marriage with consent, and in case any of the children should die before their shares became due, the share to go to the rest of the children, and their issue *per stirpes*.—R. married without consent, had a child since dead, and died under twenty eight—held the portion never vested, but the testator having five children, held that one-fifth part of it vested in her child, and it was accordingly decreed to the father as representative.

HEMMINGS v. MUNKLEY and others.

**WILLIAM CLUTSOM**, by his will, gave five sixteenth parts of the residue of his personal estate to trustees “to lay out the same, and to pay the dividends, &c. to his daughter *Rachael*, on her attaining her age of twenty-eight years, or day of marriage, which shall first happen, *provided his daughter should marry with the approbation of his said executors, or such of them as should be then living.*” He gave the eleven-sixteenth parts among his other four children; and in case either of his sons or daughters should die before his, her, or their share or shares should become payable, then the part or share, parts or shares of him, her, or them so dying, should go and be paid among all the rest of his children, who should then be living, and the issue of a deceased child or children, (if any) *per stirpes*, and not *per capita*, at the same time as their original shares would become due.

*Rachael Clutsom* married *James Curley*, one of the defendants, without the consent of the executors, and had a child (to whom *Curley* is administrator) and died under twenty-eight.

Mr. *Kenyon* for the plaintiffs, insisted—the portion never vested in *Rachael*, she marrying without consent, and not attaining twenty-eight years of age.

Mr. *Scott* argued for the defendant, the husband, who claimed as administrator both to her and the child—that it vested on the marriage notwithstanding the proviso, which was only *in terrorem*, and cited *Underwood v. Morris*, 2 Atk. 184, and that whether the condition be precedent or subsequent, it will not prevent the legacy vesting, unless it be given over.

Lord *Loughborough* doubted the authority of the case, and decreed that it did not vest; but there being five children of the testator, he held the infant child of *Rachael* to be entitled to one-fifth of the legacy, under the devise over: (as being “the issue of a deceased child,”) and decreed the same to her father, in her right (*a*).

(a) Vide *Scott v. Tyler*, post, vol. ii. 431.



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## Earl of LEICESTER v. PERRY.

Lincoln's-Inn  
Hall, July 23.  
Lords Commis-  
sioners *Ashhurst*  
and *Hotham*.

**B**ILL for discovery and relief, and to prevent the defendant from setting up a legal title in a trustee, as a defence to a writ of right brought by the plaintiff, to try the title of *Penshurst* park and other estates. The defendant pleaded that the writ of right had been tried and determined against the plaintiff, which was held a good plea to further discovery (a).

Plea that a writ of right has been tried and determined against the plaintiff, a good plea to a bill for a discovery of matter relative to the title.

(a) The following account of this case is given by Lord *Redesdale* in his last edition of his valuable Treatise. p. 206. The remarks subjoined by his Lordship are peculiarly worthy of attention. The bill was brought by a person claiming to be a son and heir of *Jocelin*, Earl of *Leicester*; and alledged that the Earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee; and that the plaintiff had brought a writ of right to recover the lands, but the defendant had possession of the title deeds, and intended to set up the legal estate which was vested in the trustee; and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee: the defendant pleaded, as to the discovery of the deeds and relief, judgment in her favour in the writ of right; and averred that the title in the trustee, which the bill sought to have removed,

had not been given in evidence, and the plea was allowed. In this case his Lordship observes, the bill was brought before the trial in the writ of right, and the plaintiff had proceeded to trial without the discovery and relief sought by his bill for the purpose of the trial. The plea was subsequent to the judgment. It may be doubted, therefore, whether the averment that the title in the trustee had not been given in evidence on the trial of the writ of right was necessary, as the judgment was a bar, as a release subsequent to the filing of the bill would have been; and if the plaintiff could have avoided the effect of the judgment because the title in the trustee had been given in evidence, it should seem that that fact, together with the fact of the judgment, ought to have been brought before the Court by another bill in the nature of a bill for a new trial, either as a supplemental bill, or as an original bill, the former bill being dismissed.

Sir

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Sir JOHN BORLASE WARREN, CAROLINE his  
Wife, and the Trustees of his Marriage Settle- } Plaintiffs.  
ment. - - - - -

ARNOLD WARREN, AUGUSTUS PARKINS, and  
FRANCES his Wife, which ARNOLD and } Defendants (a).  
FRANCES are younger Children of JOHN  
WARREN the Testator.—FRANCES HURST  
the surviving Trustee of the Term, and others }

Lincoln's-Inn  
Hall, July 26.

Lords Commis-  
sioners, Ashurst  
and Hotham.

In the marriage settlement, by which a life estate was given to the wife, there was a power to raise £10,000 for younger children; the settlor, by will (reciting that he had made no settlement on the wife) provided portions of [306] £5,000, if but one younger child, £2,000 each if more. There being two younger children, decree that this provision by the will is in part satisfaction of the portion by settlement, and only £10,000 shall be raised.

**JOHN WARREN**, Esq. father of the plaintiff, Sir *John Borlase Warren*, by indenture of lease and release, after marriage, dated 1st and 2d July, 1754, conveyed his estate to trustees, to the use of himself for life, remainder to trustees to preserve contingent remainders; remainder to his wife for life, remainder to trustees for a term, to raise £10,000 for younger children: remainder to his eldest son in tail; remainder over to other sons, &c.—In the settlement was a power reserved to him to raise money, but subject to the wife's life estate, and the provision for the children; and also a *proviso*, that in case he should, in his life-time, give to any of his younger children any sums of money towards his or their portions and advancement, and declare the same by writing, to be in part of his or their portions, they should go *pro tanto*, in satisfaction thereof.—By his will, 14th of November, 1758, reciting that he had made no provision for his wife by settlement or otherwise, he declared it to be his will that the trustees should pay her £600 *per annum* for life, in bar of dower, and if he should have one younger child only, they should raise £5,000 for such one child, if more £2,000 each, which he charged on his personal estate, and in default thereof upon the settled estate. He died in 1763, leaving plaintiff his eldest son, and two of the defendants his younger children. The prayer of the bill was to declare the will well proved, and that the two younger children should be declared to be entitled to only one of the two provisions, and that upon payment to them of £5,000 each, *Hurst* should be decreed to assign the term.

This cause was argued before the late *Lord Chancellor* on the 11th, 12th, and 14th June, 1782.

Mr. *Mansfield* for the plaintiffs.—The younger children set up a claim to both the provisions. The testator, in making the provision by will, had forgotten the settlement. This appears clearly, for he gives his son exactly the same interest in the estate he had by the settlement; but recites that he had made no provision for

(a) The facts of this case are much more fully stated, 1 Cox, 41.

his wife, for whom in fact he had provided. He orders the interest of the £2,000 to be applied by way of maintenance, and for the education of the children. He had no estates but what were settled. There was a power in the settlement to raise money, without which there would have been no fund out of which to raise the charges; and that power was subject to the provisions for the wife and children. In \**Hartop v. Whitmore*, 1 P. W. 681, a less sum advanced in the life-time, was held a satisfaction. In *Thomas v. Keymish*, 2 Vern. 348, in a charge on certain lands by marriage settlement, and afterwards an equal portion charged on other lands, this was held a satisfaction.—This case is stronger against double portions than any other.

Mr. *Hardinge*, on the same side, cited *Lee v. Cox & D'Arunda*, 3 Atk. 519. *Copley v. Copley*, 1 P. W. 147. *Rawlins v. Powel*, ib. 297. *Clark v. Sewell*, 1 Atk. 96. † *Ackworth v. Ackworth*, 19th July, 1773. *Jesson v. Jesson*, 2 Vern. 255.

Mr. *Attorney-General*, for the younger children.—The portions must be accumulative; the intent certainly is not clearly expressed, but it appears from the state of the family: he was a man of very large property. As to the execution of the power, Mr. *Mansfield* admits it would be good if the children were unprovided for, but a court of equity goes further, and will hold it well executed for younger children, unless it goes to the disherison of the heir at law, the same rule prevailing as in the case of supplying surrenders. The will here is within the limitation of the power. Though in this case there is not a valuable consideration, it is sufficient to its

\* This case is very inaccurately stated in 1 P. W. and although more correctly, yet imperfectly, in *Precedents in Chancery* 541; the words of the will, as taken from the record, were as follow:—I further will, devise, give and bequeath “to my daughter *Dorothy Whitmore* £300, if she should be then living and unmarried, or married by and with her said mother’s full consent, first had and obtained in writing, but if married, when it is appointed to be paid her, and that without her mother’s full consent first had and obtained in writing, then and in such case, I hereby will and bequeath her only £200, and that to be paid her at the age of twenty-three years,” and made his wife (the defendant) executrix. The daughter married *Young* the bankrupt, in the life of the father, without consent (though after a treaty and offer of £200 portion, which had been refused); the husband after marriage applied for her fortune; the father offered him £200, and the defendant *Sarah* said, if she survived her husband, and had it in her power, she would give her another £100. The husband would not then accept it, but afterwards wrote a letter for it, and it was paid to *Fleming* for his use, who gave a receipt for it. *Young* became a bankrupt, and the plaintiff was his assignee, and filed a bill for the legacy.—*Bill dismissed*.

† *Ackworth v. Ackworth*.—Before marriage, a sum of money, partly belonging to the husband, partly to the wife, was settled to the use of the husband for life; remainder to the wife for life, remainder to the children, to be equally divided among them. There were several children, and the money amounted to only £2,400 among them. The father afterwards made his will, and gave each of the children £2,000, and the residue of his estate among them. Lord *Bathurst* decreed, that what they took by the will should be in lieu of their portions under the settlement.

being

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being a good execution of the power, that it is for a person having a meritorious consideration. When he made his will his fortune was not diminished, there was no reason therefore to diminish the portions of the younger children. There are several cases where portions being to be raised by a settlement, and the money is afterwards paid *eo nomine*, the settlement has been held to be satisfied, but those cases do not apply to this; £10,000 was to be raised by the settlement, £4,000 by the will, how can this be a satisfaction? If it was a debt being less, it would be no satisfaction; so held in *Rawlins v. Powell*, that if the second portion is larger, it shall be a satisfaction.—It follows, that if the second portion be not as great or greater than the former, it is not a satisfaction. As to his having forgotten the provision; he recites, that he had not provided for the wife; he might have forgotten the provision for the wife, without having forgotten that for the children, there are no such introductory words to that clause. The interest of the £4,000 is to be paid *towards* the education and maintenance;—he was conscious this was not sufficient, but must be supplied from elsewhere, which could only be from the settled fortunes.—As to Lord Hardwicke's language, that it is hard a party should take two portions, where one only is intended; it appears by *Shudal v. Jekyll*, 2 Atk. 516, that it does not apply, where the intent is to give both.

Lord Chancellor.—A great number of cases have been cited to shew that the Court leans against double portions: but I have not found that it would do as a distinct rule, that where a parent has made a provision by will for a child, whom he has afterwards provided for in marriage, it is *primâ facie* a satisfaction. If it is so *primâ facie*, the Court should on all occasions examine whether there be ground enough to repel the presumption. Several of the cases appear to be repugnant to the rule. What is there to shew the extent of the parent's bounty? It would be difficult to reconcile *Thomas v. Keymish*, as reported by *Freeman* (vol. ii. 207). If the rule is differently laid down, it must be subject to exceptions. It is important to consider the rule, because if there be no rule the question will be, whether the presumption that he had forgotten the settlement will be sufficient. If there be a rule, it is much fortified by the apparent forgetfulness; but, without the rule, it is difficult to say, he did not mean it accumulatively. Suppose then to be such a rule, there is another question of some consequence whether parties have not a right to contract in contradiction to it. Here they have so contracted, if he shall advance portions in his life-time, and guard it by writing. It is hard to say, that if he has advanced money without such a declaration, that he should not give it augmentatively. The argument is, that this is by will not in his life-time. It is not in the terms of the deed to be sure. Being a provision it might be held, that unless he guarded it by writing it would

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would be the extent, and the second question would not be material. Suppose he had charged it in the words of the power, it would have been sufficient, though he had not ordered it to be raised by mortgage. If a man gives that ownership which must arise out of the power, it will be an execution of the power. I will try if I cannot, from the case, draw a rule, without resting on the Court's leaning to, or against double portions: the Court ought to go on more precise rules.

*Adjourned.*

Lord *Thurlow* not having pronounced judgment in this cause, it was re-argued before the Lords Commissioners, upon the 22d of this month, by Mr. *Mansfield*, Mr. *Hardinge*, and Mr. *Hollist*, for the plaintiffs, who used much the same arguments, and cited the same cases, as upon the former occasion, except that Mr. *Hollist* added to those formerly cited, \* *Byde v. Byde*, East. 1 Geo. 3, before Lord *Northington*, and the † *Duke of Somerset v. the*

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\* *Byde v. Byde* (a).—R. S. *Byde*, having issue by a former wife one son, upon marrying a second wife, by settlement, July 3, 1699, settled lands on himself and his wife, for their lives, remainder to trustees to sell the same to his son, by the former marriage, for £5,000, for a provision for the children by the second marriage. Afterwards, having three children, and his wife being ensient, he by will, July 10, 1705, gave £1,000 to each of the three children by the second marriage, by name, and £1,000 to the child of which the wife was ensient, and charged his lands with these portions. After his death, the son paid the £1,000 portions, and accepted the purchase, and the wife dying in 1755, after her decease, the plaintiff, the only surviving child of the marriage, brought this bill to have the purchase completed, and to be paid the £5,000 over and above her portion under the will. Lord *Northington* thought the testator meant to give each child an election, and that, by accepting the legacies, they had made their election to take under the will; and therefore dismissed the bill without costs.

† *Duke of Somerset v. the Duchess Dowager of Somerset*, Lords *Webb*, *William* and *Francis Seymour*, and *Vincent John Biscoe*, Esq. administrator of Lady *Mary*, his wife.

Sir *Edward Seymour* and Mr. *Webb*, the paternal and maternal grandfathers of the plaintiffs, upon the marriage of the plaintiff's father, entered into articles of agreement, dated March 2, 1716—whereby Sir *Edward Seymour* agreed to settle the estates at *Berry-Pomeroy* on the plaintiff's father, chargeable with the following portions for younger children, namely, £4,000 each, for one or two, or £12,000 equally to be divided between three or more children, payable at twenty-one, or marriage, which should first happen after the death of the father, besides which he agreed to advance £1,600 to be laid out in lands as an additional jointure for plaintiff's mother, and for the benefit of her issue male.

Sir *Edward Seymour* died in 1740, whereupon plaintiff's father, the last Duke of *Somerset*, took under the marriage articles: and he also died in 1757, leaving plaintiff his eldest son, defendants his widow and younger children.

But plaintiff's father by his will, made fresh provision for every branch of his family, and bequeathed to his three younger sons £5,000 each; and to his daughters the third part of his *Worcestershire* estates, or £8,000 in lieu thereof, with cross bequests between his sons and daughters, in case of any of them dying under age, and charging the whole upon his estates at large, which he

(a) This case has been since fully reported, 1 Cox, 44, and from Lord *Northington's* notes, 2 Eden, 19.

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*v. the Duchess of Somerset*, and others, 9th, 10th, and 11th of March, 1767, before Lord Camden.

Mr. *Kenyon*, Mr. *Arden*, and Mr. *King*, again argued for the defendants.

And this day Lord Commissioner *Ashhurst* pronounced judgment. The question is, whether the two thousand pounds given by the will, shall go in part satisfaction of the provision made by the settlement: and we are of opinion that it shall. Upon the general ground, this is a strong case for satisfaction. The general rule is laid down in *Clark v. Sewell*, 3 Atk. 96. In the case of portions, as both move from the same person, the Court will overlook the difference of the time of payment, and consider the one as a satisfaction for the other. In *Lee v. Cox*, 3 Atk. 419, the distributable share was considered as a satisfaction. In *Hartop v. Whitmore*, 1 P. W. 681, a less sum was so considered. *Copley v. Copley*, 1 P. W. 147, and *Jesson v. Jesson*, 2 Vern. 255, are exceeding strong cases. They all shew the rule to be, that whether the sum be greater or less is immaterial, but in the latter case it shall only be a satisfaction *pro tanto*. On the other side, they have cited *Saville v. Saville*, and *Duffield v. Smith*. *Saville v. Saville*, 2 Atk. 458, turned on the peculiar penning of the will. *Duffield v. Smith*, 2 Vern. 258, was held no satisfaction, because less, and the other portions were contingent; and as to the sum given by the brother, there was a fair implication that he meant to give it in addition. As to the question whether the testator had forgotten the prior provision; it is admitted, if he had, this bequest ought to go in satisfaction. We think there is ground to suppose that he had forgotten it; he shews he had as to the wife, which makes it probable he had also forgotten the other. A further reason for supposing this is, his giving the interest of the £2,000 for maintenance. In truth, it is probable that, at the time when the settlement was made, his whole intent in suffering the recovery was to bar the intail, and the other part of the deed was only suggested as what he might as well do, and that the provision had afterwards been forgotten. We must decree, therefore, that the £2,000 is in part satisfaction, and that upon the payment of the £5,000 each, the surviving trustee is to assign the term (a).

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devises to the plaintiff, his eldest son, with remainders over to his younger sons, successively in tail male.

Plaintiff filed his bill, praying, amongst other things, that his younger brothers, and sister's husband, might elect to take under the articles or will.

Defendants, Lord *Francis Seymour*, and *Vincent Biscoe*, submit to the Court, whether they are compelled to make their election; but if compelled, prefer to take under the will, as evidently the larger and better provision.

At the hearing of the cause, the Lord Chancellor directed all the defendants to make their election.

(a) The doctrine of the Court upon double portions, whether in the case the subject of presumption against of satisfaction by will of a portion previously



previously secured by settlement, or the ademption of a legacy by subsequent advancement, is collected and arranged in Mr. Sanders's note to *Bellasis v. Uthwaite*, 1 Atk. 427, and Mr. Cox's note to *Copley v. Copley*, 1 P. W. 147. See also *Brown v. Peck*, 1 Eden, 140. *Williams v. Duke of Bolton*, 1 Dick. 405. *Byde v. Byde*, 2 Eden, 19. 1 Cox, 44. *Jeacock v. Falkener*, ante, 294. *Grave v. Earl of Salisbury*, post, 425. *Holmes v. Holmes*, ib. 555. *Debeze v. Mann*, post, vol. ii. 165. *Ellison v. Cookson*, ib. 307, and vol. iii. 61. *Hanbury v. Hanbury*, post, vol. ii. 352. 529, where all the authorities upon the doctrine of satisfaction are cited and fully commented upon. *Powell v. Cleaver*, ib. 500. *Baugh v. Reed*, post, vol. iii. 183. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. *Sparks v. Cator*, ib. 530. *Freemantle v. Bankes*, 5 Ves. 79. *Trimmer v. Bayne*, 7 Ves. 508. *Twisden v. Twisden*, 9 Ves. 413. *Robinson v. Whitley*, ib. 577. *Bengough v. Walker*, 15 Ves. 507. *Hartopp v. Hartopp*, 17 Ves. 184. *Chave v. Farrant*, 18 Ves. 6. *Ex parte Pye*, ib. 140. *Monck v. Lord Monck*, 1 Ba. & Be. 298. *Dwyer v. Lysaght*, 2 Ba. & Be. 156. The established doctrine seems to be, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion, and by a sort of artificial rule in the application of which (as

observed by Lord Eldon, 18 Ves. 151,) legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a bearing against double portions, if the father afterwards advances a portion on the marriage of that child; it is a satisfaction of the whole or in part. It has indeed been urged in argument, but not supported by decision, that the Court has said, that this doctrine was not intended to be confined to persons standing in that actual relation, but perhaps might apply to a person placing himself *in loco parentis*, undertaking the care of an orphan, *Spinks v. Robins*, 2 Atk. 491. *Shudall v. Jekyll*, ib. 517; but in general a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt; he must therefore be proved to mean it as a portion or provision, either upon the face of the will, or by evidence applying directly to the gift proposed by that will, (18 Ves. 153, 154). As to the admission of parol evidence in these cases, vide *Powell v. Cleaver*, *Ellison v. Cookson*, and *Debeze v. Mann*, cit. sup. As to the application of this doctrine to natural children, vide *Grave v. Earl of Salisbury*, cit. sup. and for the general cases upon the subject of satisfaction and performance, *Haynes v. Mico*, ante, 129, and the Editor's note, and *Jeacock v. Falkener*, cit. sup.

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LINGARD and others v. The Earl of DERBY and others.

**THOMAS BARLOW**, by his will, directed all his debts to be paid out of his estate with all convenient speed, and ordered his personal estate to be converted into money and applied in aid of his real estate, in payment of funerals and debts, as far as the same would extend. In case he should die without issue, he devised his estate of *Barlow Hall* (subject to the charge) to trustees in trust, to pay the yearly rents and profits as follow: In discharge of his wife's jointure, and his sister's annuity, and in payment of such of his debts, and the interest thereof, as his personal estate should fall short of satisfying, and subject thereto to pay his brother *Humphrey Barlow*, an annuity of £100 per annum, to continue till after his debts affecting his lands should be paid off by the rents and profits of his estate, and immediately after the payment of his debts,

creditors file a bill, praying a sale; but this Court cannot, under the devise, decree the estate to be sold. Devising an estate for payment of debts, takes it out of the statute of fraudulent devises.

Lincoln's-Inn  
Hall, October 31.

Lords Commissioners, Lord  
*Loughborough*,  
*Ashurst*, and  
*Hotham*.

T. B. devised his estate to trustees to pay yearly rents and profits in discharge of his wife's jointure, his sister's annuity, and in payment of his debts, and the interest thereof; then to certain uses. The

then

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LINGARD  
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then £200 *per annum*, in lieu of the £100, and an additional annuity of £50 to his sister. And, as to the residue of the rents and profits, he gave them to the first and other sons of *Humphrey Barlow*, with remainders over. One of the sisters has a son, who, under the limitations, is first remainder-man in tail, *in esse*. The bill was filed by the specialty creditors and annuitants, against Lord *Derby*, a mortgagee, and the other parties; praying an account of the personal estate, and that if it should prove insufficient to pay the debts, the deficiency might be made up by sale of the real estate. Upon a reference to the Master, it appeared that the personal estate was little more than £300, and the debts amounted to above £8,000, and his Honour ordered the money for the payment of debts, to be raised by mortgage(a). It came on now again for further directions, it appearing by the report, that a sufficient sum could not be raised by mortgage, and the question merely was, whether the Court, under the will, could order a sale.

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Mr. *Arden* for the plaintiffs, contended—that under the words of this devise the estate might be sold, and cited, for that purpose, *Rawlins v. Brotherson*, in the Exchequer, Feb. 21, 1788, which was a term of five hundred years, and a direction to pay, out of the annual rents and profits, all the debts the testator should owe; then to pay legacies, and, after payment of both, the term to cease; the Court thought the term ought to be sold.—The Master of the Rolls having decreed a mortgage, it may be equally a sale, for a mortgage may be equivalent to a sale.—Such a will as this cannot

(a) This order was made on the 28th July, 1779, at a hearing before the Master of the Rolls for further directions, when he referred to the Master to compute subsequent interest on the mortgage, and on the other specialty debts of the testator, and that what should appear due for principal and subsequent interest and costs on the mortgage, and what should appear to be remaining due to the testator's other specialty creditors should be raised by mortgage of his real estate charged by his will with the payment of his debts, or of a sufficient part thereof.

The above was taken from the recital in an act of parliament passed 24 Geo. 3. the title whereof is printed in the table to the private acts, c. 23, and in which the above order and other decretal orders are recited, and that they could not be carried into execution, and that a sale would be for the benefit of all parties interested under the will, but could not be effected without the authority of parliament.

N. B. The objection to the power of the court to direct a sale, seems equally to hold against the power to direct a mortgage, and therefore the decree in this case seems not consistent with that at the Rolls directing a mortgage, for that was to raise money not only for payment of what was due to the mortgagee, but also for what was due to the specialty creditors; as to what was due on the mortgage, that might be raised by assignment or by a new mortgage if there was any reason for preferring that to an assignment: The office copy of the above act was laid before me by Mr. *Radcliffe* of *New Inn*, on the part of Mr. *Thomas Anthony John Bredall Barlow*, the tenant in tail, under the will mentioned in this cause, and who in May, 1800, procured the surplus money after payment of debts and incumbrances to be invested in the purchase of lands, and settled as directed by the act, in order that he might suffer a recovery thereof, in this Easter term. (Serjt. *Hill*).

stand by the statute of fraudulent devises, for a bond-creditor, without the devise, may compel a sale of the land, and this devise tends to defeat his claim. Can the devise amount to saying the debts shall be paid? If there is not a sale, the annuitants never can have any thing during their lives.

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Lord *Loughborough*—(without hearing the other side.)—Where the devise is to pay the debts out of the *profits* of the estate, it is equivalent to a devise to the trustees to sell, and a decree for a sale is only an execution of that trust. But I am afraid you will find, that, both by the words and construction of the statute of fraudulent devises, where there is a devise for the payment of debts, it takes the case out of the statute, and it stands as it would have done before the statute was made: the creditor can come only as the will directs. I take it to be the clear intent of the testator here, that not an acre should be alienated for the payment of his debts; therefore there cannot be a sale (a).

It was ordered to stand over in its present state, to give an opportunity to the parties to apply to parliament.

(a) In *Hughes v. Doulsen*, post, vol. ii. 614, which is better reported, 2 Cox, 170, Lord *Thurlow* dissented from this opinion, observing, that if it only meant to determine that the inconvenience of the mode prescribed by the testator for the payment of his debts, would not bring it within the statute of fraudulent devises, provided the fund was ultimately sufficient, he agreed with the case, but that if it was meant to be laid down that even

though by the mode prescribed, the fund would turn out ultimately insufficient for the purpose, he would consider it as a fraudulent devise, and so it has been since considered, vide *Ridout v. Earl of Plymouth*, 2 Atk. 104. *Earl of Bath v. Earl of Bradford*, 2 Ves. 590. *Gott v. Wilkinson*, Willes, 521. *Bailey v. Ekins*, 7 Ves. 323. *Kidney v. Cousmaker*, 12 Ves. 154. Serjeant *Williams's* note to *Jefferson v. Morton*, 2 Saund. 8. d.

MICHAELMAS

## MICHAELMAS TERM.

24 GEO. III. 1783.

ALEXANDER Lord LOUGHBOROUGH,  
 Sir WILLIAM HENRY ASHHURST,  
 Sir BEAUMONT HOTHAM,  
 JOHN LEE, Esq. Attorney-General.  
 JAMES MANSFIELD, Esq. Solicitor-General.

Lords  
 Commissioners.

Lords Commis-  
 sioners, Lord  
*Loughborough,*  
*Ashhurst, Hotham.*

## (a) THONG v. BEDFORD.

*W. T.* devised to his wife for life, remainder to trustees to preserve contingent remainders; remainder to *E.* for life; remainder to trustees *ut supra*; remainder to the heirs of her body; remainder over. In a subsequent clause he declared his intention, that *E.* should have only a life estate. Upon a bill filed by the remainder-man for a conveyance, in which *E.* should take only a life estate, it was demurred to, and the demurrer allowed, because these are all legal estates, and the plaintiff not entitled.

**W**ALTER THONG, by his will, devised the premises in question to his wife for her life, remainder to *Sawbridge* and another, as trustees, to preserve contingent remainders, and immediately after the decease of his wife, he gave the same to his daughter *Elizabeth* (one of the defendants) for her life, remainder to the same trustees to preserve contingent remainders during the life of his daughter, remainder to the heirs of her body lawfully begotten, remainder to plaintiff, his heirs and assigns, for ever:— and went on thus: “It being my will and meaning, that, after the decease of my wife, my said daughter shall have only an estate for life in the premises; and that, after her decease, it may go to the heirs of her body, and, in default of such heirs, should vest in my grandson (the plaintiff) and his heirs; and that my said daughter should not have any power to defeat my intent;” and he gave powers to his trustees, to do all necessary acts to effectuate his intentions. The wife of the testator is dead.—The bill was filed by the remainder-man in fee, praying, that the will should be declared to be well proved, that the trusts might be carried into execution, that the defendant *Elizabeth* might be declared to be the only tenant for life, and that a conveyance might be made by the trustees, and all proper parties join therein, to *Elizabeth* for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons, in strict settlement; remainder to daughters, and, in default of such, to the plaintiff in fee.—To this bill the defendants demurred, and for cause of demurrer said, that the defendant *Elizabeth* is seised of a vested estate tail; and that the plaintiff has no vested estate whatsoever.

(a) *Butler's* note on Co. Lit. 290 b. Sect. 504. 4 T. R. 444.

It

It was argued by Mr. *Mansfield* and Mr. *Scott*, in support of the demurrer; first, that these were legal estates; second, that even were they equitable interests, *Elizabeth* would have an estate tail. First, these are legal estates in the several takers; no estate is given to the trustees, they are purely trustees to preserve contingent remainders. There are no debts to be paid, or acts to be performed by them. There is no case in the books, where trustees of this sort are construed to have any estate given them for other purposes. The power given to do all proper acts is merely equivalent to the common power of trustees to preserve contingent remainders, to make entries, and bring actions. Second, on the second head, they cited *Bale v. Coleman*, 1 P. W. 142. *Garth v. Baldwin*, 2 Ves. 646. *Colson v. Colson*, 2 Atk. 246. *Ambrose v. Hodgson*, Doug. 323. *Jones v. Morgan*, ante, p. 206.

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Mr. *Kenyon* and Mr. *Lloyd* for the defendants, argued, first, That these were equitable estates; that the trustees were to do acts to prevent the testator's intent from being defeated: in order so to do, they must have such an estate in them as would enable them to do such acts as should be necessary, and whenever there are acts to be done, the Court will raise an estate for the purpose, as in *Shaw v. Weigh*, Eq. Ab. 184.—They cited to the second question, *West v. Errissey*, 2 P. W. 349. *Neale v. Neale*, before Lord Bathurst; *Lloyd v. Roberts*, before Lord Northington; *Lowe v. Davies*, Lord Raym. 1561. *Bagshaw v. Spencer*, 1 Ves. 142. *Lisle v. Grey*, 2 Lev. 223. *Attorney-General v. Sutton*, 1 P. W. 754. *Papillon v. Voice*, 2 P. W. 471.

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On the 11th of November, Lord *Loughborough* delivered the opinion of the Court.—He stated the case, the prayer of the bill, and the cause of demurrer.—The case depends on two points; first, it is contended by the defendants, that these are devises of legal estates, consequently that the trustees have no estates to convey. If this proposition be true, the consequence is clear, that the demurrer must be allowed. Second, that, supposing them equitable estates, *Elizabeth* is entitled to a vested estate tail, consequently no conveyance can be ordered; as it would be nugatory. The second question involves the consideration of several important cases, as *Bagshaw v. Spencer*, and *Garth v. Baldwin*. It is unnecessary to enter into this question if the former is clear. And we are all agreed that these are legal estates. The first to the wife is a clear legal estate; that to the daughter is also a clear legal estate: after the widow's estate, unnecessarily, and after the daughter's, necessarily, as the parties thought, are introduced trustees to preserve contingent remainders, who take clear legal estates *pour auter vie*. The subsequent words go to restrain the estate of the daughter: how far they will operate is a proper question for another jurisdiction, they are not stronger than the words that have been used in other

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other cases, as in *Robinson v. Robinson*, 3 Atk. 736. the giving an estate without impeachment of waste, or the interposing trustees to preserve contingent remainders (a). But it is contended, from the power given to the trustees, that it is sufficient to turn their estates *pour auter vie* into an estate in fee, or that it is giving a power which requires a fee to be able to give it effect. In fair reasoning, the latter part of the proposition is no more than the first. If we were to use these words to enlarge the estate of the trustees, we should go too far, for it would be to render other words in the will useless.—The estates to the trustees for the lives of the wife and daughter must be struck out; they could not have a legal fee and estates *pour auter vie* at once in the same lands. The meaning only was, that they should have the powers incident to their character of trustees to preserve contingent remainders. The demurrer must be allowed, and it is unnecessary to anticipate any future case as to the effect of the limitation (b).

*Demurrer allowed.*

(a) See Mr. Fearn's observations upon this passage of Lord Loughborough's judgment, Cont. Rem. 178. There seems no doubt, but that according to the observations of Lord Talbot, in *Lord Glenorchy v. Bosville*, For. 19. and of Lord Hardwicke, in *Bagshaw v. Spencer*, 2 Atk. 581. 1 Ves. 149. upon the similar clause in *Leonard v. Earl of*

*Sussex*, 2 Vern. 526. and also upon the authority of the decision in the Exchequer Chamber in *Perrin v. Blake*, Fearn C. R. 156. that the estate limited to Elizabeth the daughter, must have been construed an estate tail.

(b) Vide *Boteler v. Allington*, ante, p. 72. and *Shapland v. Smith*, ante, p. 75.

S. C.

Amb. 776.

Lords Commissioners, Lord Loughborough, Ashurst, and Hotham.

N. T. devised an annuity of £300 per annum to his wife for life, then to accumulate to make a portion for his first daughter who should marry,—then, in order to

raise portions for other daughters; then to remain to his eldest son, and on his decease to the heirs male of his body, and in case of his having no issue, remainder to his next eldest son and his heirs male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue. This is not personal estate, vesting absolutely in the eldest son (on the principle, that it would be an estate tail in land; neither does it vest as an executory devise in the fourth son of testator who survived, but it is an annuity, and being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of the testator.

### TURNER v. TURNER.

NATHANIEL TURNER, Esq. by his will, dated 7th January, 1734, gave to his wife Elizabeth Turner, £300 per annum, during her life, to be paid annually by his executors, and after his death the said £300 per annum should be improved by his executors, to make a sum to be given to his first daughter who should marry, after the decease of his said wife, with the consent of the executors; and after one of his said daughters should be married, then to be improved to make a fortune for the rest of his daughters marriages, one after another; and when all his daughters were married, that the said £300 a year should be given, and re-

main



his eldest son Nathaniel Richard Turner, and on his death the heirs male of his body; and in case of his having no male of his body; and gave the residue, real and personal, all his children, to be equally divided: and appointed his others executors. He died soon after, leaving ten children, sons, named Nathaniel Richard Turner, Richard Farnner, John Worthington Turner, William Turner, and Turner, and five daughters.—Soon after his death, Sarah, he daughters died, and the mother took out administration.—Soon after a bill was brought in Chancery, in the name of the surviving children, against the mother as administratrix, and against the executors for an account of the personal and a distribution of the residue according to the will.—A decree was obtained for that purpose on the 2d April, 1736, which directed the executors to pay the widow the £300 a year, and to set aside a sum to answer the same.—The Master reported the account &c. as directed, and interest, and that £7,500 South-sea annuities had been set apart, and reserved by the executors to answer the annuity of £300 which he deducted out of the clear estate, and then divided what remained into ten parts.

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An order of 27th February, 1737, on the petition of Elizabeth Turner the widow, stating her apprehensions, that £7,500 South-sea annuities, was not a sufficient security to answer the annuity, it was referred to the Master to set apart so much of the estate as would be sufficient.—The Master reported that he had set apart £10,000 part of £20,000 old and new South-sea annuities, to answer the annuity of £300.

Nathaniel Richard Turner died in the life-time of the widow Elizabeth, without issue, having made his will, and devised the residue of his estate whatsoever and wheresoever unto John Turceased, and plaintiff, upon trust for the several persons mentioned, and appointed them executors—Richard Farnner, John Worthington Turner, and William Turner, who all died without issue, in the life-time of the said Elizabeth and her other.—The daughters had been satisfied their portions out of the rents and profits, in the life-time of the mother.—Elizabeth's mother died 8th July, 1782.

A bill was brought by the plaintiff, surviving executor and administrator of Nathaniel Turner, to have the directions of the Court in relation to the £10,000 South-sea annuities, and the annuity secured

the questions were, whether the £300 per annum, under the will of Nathaniel Turner, vested (subject to the life estate of Elizabeth; and to the accumulation for providing fortunes for the children) in Nathaniel Richard Turner, and passed by his will;

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or

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or whether the same was part of the estate of *Nathaniel Turner* the elder, undisposed of, and distributable among his next of kin; and also, whether *Charles* in the events which have happened, took any, and what interest in the same, other than as claiming a distributive share of the undisposed estate of *Nathaniel*, or under the will of *Nathaniel Richard* his brother.

The cause came on first on the 30th of *June* last, at *Lincoln's Inn Hall*.

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Mr. *Selwyn* for plaintiffs.—An absolute interest passed by the will to *Nathaniel Richard*; the testator orders it to go to him, and the heirs male of his body, which, in real estate, would be an estate tail; and therefore this being personalty, vested absolutely.

Mr. *Madocks* for *Charles*.—This is the same as if he had ordered a sufficient part of the personal estate to produce £300 a year, to be set aside for his wife for life, then the interest to be paid to his daughters as they should marry; and when they should all be married, to be given to *Nathaniel Richard Turner*, and upon his decease to the heirs male of his body.—*Nathaniel Richard* has given all his interest among the other children, so that if *Charles* has no claim, it comes to the same thing as if it was distributable.

Mr. *Mitford* for *Charles*.—*Charles's* claim is as next eldest son, *Nathaniel Richard* being dead without issue. This is a gift to the wife of an annuity as a general charge; that gift satisfied, the next, and every subsequent gift, are substantive and separate gifts, first to the wife, then to the daughters, then to the son—not limitations over. *Nathaniel Richard* being dead at the time of the death of the wife, could not take: then the other gift takes place to the next eldest son, by which he meant such son as should be eldest at the death of the wife; *Charles* is the only person who then sustained that title.

Mr. *Kenyon* for the defendants in the same interest with the plaintiffs.—The annuity given to the daughters, &c. is certainly the same annuity that was first given to the wife, and is referred to as such; there is no ground for the ingenuity which has represented them as separate annuities, and *Charles* in the light of taking a substantive gift. As a chattel interest, it vested in *Nathaniel Richard*. Supposing it to be an annuity, to continue for ages, it would be a fee-simple conditional at common law. No limitation could be made after the estate tail to *Nathaniel Richard*, there could be nothing but a *reverter*, which would bring it to the general fund; but I contend, that it vested absolutely in *Nathaniel Richard*. It was held in a case cited here lately from the year book, that the vesting

vesting was not suspended till the death of the first taker\*. It was so held also in *Pelham v. Gregory*, 5 Bro. P. C. 435.

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Mr. Scott for other defendants in the same interest.—The case must be argued upon absurd principles, if it is not allowed that *Nathaniel Richard* took an estate tail; for the testator certainly meant he should take as large an interest as any other son, and the next eldest son would take an estate tail. But I argue that *Charles* is not within the description of *the next eldest son*. If the intermediate son had had issue, the testator did not mean to prefer *Charles* to that issue; he therefore meant his next eldest son at the time of making the will. The words "*heirs male of his body*" are only descriptive of the quantity of interest he was to take. The whole is a distribution of the same fund, and is the common case of money given to *A.* for life, remainder over, which vests immediately. Suppose it to have been distributable to all the sons, the interest would have been vested; then it must vest in the single object. *Corbet v. Palmer*, 2 Eq. Ab. 548.

The cause stood over to the 7th of July, when it was in the paper for judgment.

Lord Loughborough.—A doubt has struck me.—The subject of the bequest is an annuity of £300 *per annum*, given to the wife, and afterwards to the daughters, and then that it should be and remain to the eldest son. The first question is, what estate *Nathaniel Richard* took. The second, whether it vested in the life of the wife. But I have a doubt whether *Nathaniel Richard* took any interest. Where a person, if the subject was land, would take an estate tail, there he should in personalty take an absolute interest; but my doubt is, whether this rule is applicable to the subject-matter. An annuity cannot be barred by the same means as a real estate. No recovery can be suffered of it. Dr. & Stud. Dial. 1. c. 30. p. 97. What is the consequence, that you cannot entail an annuity: therefore, you do not reason aptly to an annuity from another kind of estate. It can only be affected by a feasible condition. Then *Nathaniel Richard Turner* took nothing, for nothing would have passed to him but the use. Then there is a *reverter* in the donor (*Nathaniel Richard* taking nothing) which will be distributable. But there may be another question, whether it may not pass by an executory devise. If it may, it would be a conditional devise to *Nathaniel Richard*, with an executory devise to somebody else,—as for instance, to *Charles*. Then it would be a question, whether it could be distributable during the life of *Charles*. It will be material to consider, whether there

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\* The Reporter presumes Mr. K. meant 37 Hen. 6. fo. 30, cited in *Lord Hastings v. Douglas*, Cro. Car. 344, and lately in *Foley v. Burnell*.

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be any rule of law to prevent its passing by executory devise, from whence another question will arise, whether the description applies to *Charles*. If there can be no such executory devise, then it must be a *reverter*, and part of the testator's personal estate. There was a case before Lord *Northington*, which bore two or three arguments, of *Middleton v. Price*\*. It was of an annuity out of the customs of the port of *Hull*, granted in fee, and made the subject of a strict settlement. The question was, whether it would pass by a recovery.

Mr. *Jackson* (as the Reporter understands *amicus curiæ*) observed, that the legislature, by the act of 4 & 5 *W.* considered a perpetual charge on the public revenue as real property, which it would be now if the legislature had not expressly made it personal.

The cause again stood over, and was put in the cause paper for the first day of causes, in *Michaelmas* term: but came on upon *Monday* the 10th of *November*, when Mr. *Selwyn* and Mr. *King* urged for the plaintiffs, the representatives of *N. R. Turner*, the eldest son; Mr. *Ambler* for Mr. *Clyfford*, one of the representatives of *Nathaniel Turner*, the father; and Mr. *Kenyon* for the other defendants, nearly in the same interests. Mr. *Madocks* and Mr. *Mitford* for *Charles*; and Mr. *Scott* for other defendants, nearly in the interest of the plaintiffs.

For the representatives of *Nathaniel Richard* it was argued, that this was pure personal property, and having been given to him in such a manner, that had it been land he would have taken an estate tail, he must have taken an absolute estate, expectant on the death of the mother, and the provision for the daughters, which has now taken effect; and that having by his will, given his interest to his brothers and sisters, it must now be divided among them, and the representatives of those of them who are dead. That it had been contended these were several annuities, but there is no room to separate or distinguish the one part from another. That the gift of personal estate in tail, gave the whole interest, 1 Rol. Abr. 611. *Leventhorpe v. Ashbie*, *Seale v. Seale*, 1 P. W. 290. *Daw v. Pitt* (Earl of *Chatham v. Tothil*, 6 Bro. P. C. 450.) was expressly the same limitation, there the first taker disposing of her whole estate, disposed of this interest. The gentlemen on the other side, have likened this to a fee-simple-conditional at common law; the only cases of fee-simples-conditional are those of estates *pour auter vie*, and of inheritable estates. In case of estates *pour auter vie*, the first taker may dispose of them by simple alienation, though he has not had issue. In personal chattels, he need neither have issue nor alienate, it is absolutely vested in him at once, *Finch*

\* The Reporter understands there never was any decision in that cause, but see *Myddleton v. Pryor*, Ambl. 391.

v. *Tucker*,

*v. Tucker*, 2 Vern. 184. It has also been said, if it is not good in these views, that it may be so by way of executory devise; but here the limitation is in case there shall be no heir male, not upon a dying without issue living at the death. It is after a clear estate tail.

In behalf of the representatives of the father.—It is a mistake to say that the £10,000 *South-sea* annuity, or any money, is the subject of debate in this cause; the questions relate to an annuity of £300 a year.—The £10,000 *South-sea* annuity is only a security for payment of it, the usual and proper caution of the Court to require sufficient of the effects to be set apart to answer such demands. It is more or less, according to the interest the fund produces: £7,500 stock was at first set apart, and afterwards increased to £10,000 stock. The subject-matter being clearly an annuity, the next step is to see what sort of an annuity it is; and from thence judge of its continuance, whether it now is, or when it will be at an end. It is not an ancient annuity, *in esse*, at the time of the devise—not perpetual—not issuing out of lands: but is a mere personal annuity, created *de novo* by the will—to have a limited duration, that is, as long as there shall be heirs male of the body of the donees. When they fail the annuity ceases, and the *South-sea* annuities become discharged from it, and are instantly distributable, as so much of the residue of *Nathaniel Turner's* estate, which was locked up as long as the annuity continued. It is not like a mere personal thing, as money; which being given to one, and the heirs or heirs male of his body, passes the absolute interest in it to him, and any limitation over is void; but it has a peculiar property, a descendable quality, and will pass from heir-male to heir male *ad infinitum*, unless a certain event happens, and an act is done by which its progress is stopt; and the whole interest, as long as the annuity lasts, becomes the property of one person, that is, the having issue male and alienation. It differs from a rent-charge; it cannot be limited over, after a limitation to one, and the heirs or heirs male of his body, as a rent-charge may; it is not the subject of a recovery or fine; is not within the statute *de donis*, but remains as it did at common law, before that statute. This kind of property is, in general, called a fee-simple-conditional,—properly so as to rent-charge,—not so as to a mere personal annuity, but which is the same thing, by performing the condition and alienation, the person acquires the whole interest. In case of a rent-charge, with a limited duration to *A.* and the heirs or heirs male of his body, he may gain a fee; but it is a base fee, determinable when the heirs or heirs male of the body fail. In case of a personal annuity, he may acquire the whole interest as long as the annuity lasts, but nothing beyond it, for no more is granted. In *Chaplin v. Chaplin*, 3 P. W. 229, a widow was held not entitled to dower, where the rent-charge determined on the death of her husband without issue male; for there was

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nothing out of which she could have it, the grant being at an end: and it was particularly hard, because the rent-charge was given over in fee; but the person to whom it was given over, being owner of the land, the fee of the rent-charge was merged in law.—*Weeks v. Peach*, 2 Lutw. 1218. in avowry for rent—was the case of a rent-charge.—There were two questions. First, whether a rent-charge could be limited over after an estate-tail, and held it might, being within the statute *de donis*, as issuing out of land. Second, whether it was necessary to name the grantee, or sufficient to aver that the grantee, or his heir-male, was existing, to shew that the grant was not expired.—This brings it to the true question between the parties.—The widow being dead, and the portions for the daughters being satisfied. First, As to the claim of the executors and legatees of *Nathaniel Richard*.—They cannot be entitled, for he never performed the condition; he died without issue, and therefore had no power of alienation. Second, As to the claim of *Charles*, two answers are to be given to it.—First, He is not the person described; he was not the next eldest son. It is not sufficient to say he was so at the death of the mother: to entitle him he must be so at the death of the father. Suppose *Richard, John, or William*, had left issue male, they would have taken, and not *Charles*.—Second, If he does answer that description, yet he cannot take, the limitation over to him being void; not because it is a limitation over of a mere personal thing, but because after a grant of such annuity to one and his heirs-male, the donor has nothing left but a possibility, and that is not grantable by a private person, though it is by the king, and so considered by Lord *Hardwicke* in the case of *Lord Strafford v. Buckley*, 2 Ves. 170. Before the statute *de donis*, a rent-charge could not be limited over after an estate-tail. Plowd. 35. And it was not settled that it could, till the case of *Weeks v. Peach*. In answer to the argument, that the limitation to the next heir male is an executory devise.—First, It is a remainder, and not an executory devise. *Smith v. Farnaby*, Cart. 52. An executory devise is the taking of something in a particular event, out of an estate in fee, *Pells v. Brown*, Cro. Jac. 590.—Second, If it is an executory devise, it is too remote.—Neither of those claims being founded, it follows that the residuary legatees in *Nathaniel Turner's* will are entitled to have the £10,000 *South-sea* annuity distributed, as being now discharged of the annuity of £300, which is at an end; for securing of which only they have been locked up, or would have been distributed long ago.

For *Charles*—It was argued that at the death of the mother there was nobody but himself to take by the description.—Admitting that it is a personal property of a peculiar species, which will be inheritable, and go to the heir, not the executor; and that it may be so limited, that it will be governed by the rules of a fee-simple-conditional at common law, that when the party has issue,  
he



he may aliene: if he does not aliene, it remains his as long as there is issue: if he does he may defeat the *reverter*. Here the *reverter* could not take place, because there is a person to take within the description; the other sons being dead, *Charles* now takes as the first taker. If it cannot be limited over after an estate-tail, still it is capable of being so limited, that if the first person never came into possession, another person may take.—The intent was, that when the mother died, and the other purposes were answered, the son who should then be eldest should take; (and this remainder cannot be too remote, for that which the testator looked at was, whether *Nathaniel Richard* had or had not issue) so that *Charles* now takes it as a fee-simple-conditional at common law; if he has issue male he will have performed the condition, if not, it will revert to the donor.—The words *next eldest son*, under which *Charles* claims, could not apply to the second or third sons in being at the time of the will, for as they were born the testator might have described them; he therefore meant the next eldest son at the time it should vest.

The next day, November 11th, Lord *Loughborough* pronounced the judgment of the Court—There are three sets of claimants, the representatives of *Nathaniel Richard Turner* claim what is given by the will, or what comes instead of it as personal property limited to him and the heirs of his body, which being an estate tail in land, they say gives him the personalty absolutely.—*Charles* insists the annuity is still a subsisting charge, to which he is entitled, at least for life, and if he has a son, that that event will make it his own.—The other claimants are the representatives of the father, contending that the annuity is at an end, and they are entitled to it as part of the residue.—It has been very fully argued, and the first thing to be considered is, what is the subject-matter? Not the *South-sea* annuities, which never were the testator's property, but were purchased by the Court as a security merely. Mr. *Ambler* contends clearly and justly, that it is not a gross sum of money, or an *aliquot* part of the testator's property, but a mere annuity.—Cases of this kind do not happen often; but the law is clear as to this sort of property. It has been a little argued, that this must always be considered as personal property; but this is not so, for, from the earliest period of the law; this species of property has been as clearly distinguished as either real or personal estate. *Fitzherbert*, tit. *Annuity* (a), has defined it—that it either proceeds from the lands or the coffers of another. His definition is mostly copied (though with additions) from Co. Litt. 144 b (b).

(a) F. N. B. 152.

(b) He was dead before Lord Coke's time. (Serj. Hill) This is certainly an extraordinary mistake. *Fitzherbert* flourished in Hen. 7. and Hen. 8ths. time. The *Natura Brevium* was first published in 1534, and had gone through eight editions before the first

appearance of Co. Litt., which was in 1628; and it is referred to in almost every page of the nine first editions of Co. Litt.; the references to which were all made by Lord Coke himself. His abridgment is also frequently cited in the text with great respect, 24 a. 270 a. &c.

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Where it is charged upon land, it may be real or personal at the election of the holder: he may proceed against the land or against the person. If it is out of the coffers, it is personal only as to the remedy; but the property itself is real as to its descent to the heir. In *Lord Strafford v. Buckley*, it is said, that where there is a rent-charge, and out of it a new rent created, it will be a mere annuity, and will not charge the land but the person only. An annuity then, when granted with words of inheritance, is descendable; but as to its security is personal only: it may be granted in fee; of course it may as a qualified or conditional fee. But it cannot be entailed, Co. Lit. 20. and consequently there can be no remainder of it, for there can be no remainder of property which is not within the statute *de donis*.—*Weeks v. Peach*—where it was held, contrary to an old opinion, that there might be a remainder of a rent-charge; but for a reason which shews that there could not of an annuity.—It is argued, that as there could not be a remainder, there could not be a limitation by way of executory devise. I cannot see the reason of this, provided the executory devise was within the common rules of executory devises. If the objection that there is only a possibility, which cannot be granted, prevails, there is no reason why a like annuity (for there is no necessity that it should be the same) should not be raised; but it will, from what I shall observe in the sequel, be unnecessary to determine this.—Another character of this kind of property is, that an annuity must not tend to a perpetuity, for a fee-simple conditional must end or become absolute in the life of a particular person. We are all of opinion that there is no ground for the claim of *Charles*. If it could take place by way of executory devise, I think it would be too remote.—The words *next eldest son* cannot apply to *Charles*, who was the fourth son. It could not be intended he should take, if either the second or third son had left issue, yet *Charles* would then have borne the description of next eldest son, at the death of the wife; therefore it must have meant the next brother to *Nathaniel Richard*.—The argument for the representatives of *Nathaniel Richard* is equally excluded, as turning on the nature of the property being personalty only.—The nature of the case being such, there is nobody now who can bring a writ of annuity; the purposes of the annuity being at an end, the annuity itself is so too, and the £10,000 must return to the fund to which it belongs, the residuary estate of *Nathaniel Turner* the father.

Decreed it therefore to be divided into ten parts, to the surviving children of *Nathaniel Turner*, and the representatives of those who are dead (a).

(a) See as to this species of property, *The Earl of Strafford v. Buckley*, from whence all the learning in the present case is taken. *Savery v. Dyer*, Amb.

139. 1 Dick. 162. *Lady Holderness v. Marquess of Caermarthen*, post, 377. *Smith v. Pybus*, 9 Ves. 566.

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DIXON v. SAVILLE, and others.

**B**ILL filed by the plaintiff, widow of *Abraham Dixon*, praying that her right of dower might be declared, and that she might be paid one-third of the rents and profits of the estate in question, or her dower to be set out. The bill stated, that *Dixon* the husband died seised in fee of the premises, and devised the same to *Arthur Onslow*, the infant defendant in fee; that he made no provision for the plaintiff his widow.—The defendants in their answers, set forth, that the estate was, prior to the marriage, and still continues in mortgage in fee to the defendant *Holford*; and that therefore the plaintiff has no right to dower.

Lords Commissioners, Lord Loughborough, Ashurst, Hotham.

A widow is not dowable of an equity of redemption.

Mr. *Arden*, Mr. *Hardinge*, and Mr. *Brown*, for the plaintiff. The estate of the husband was covered by a mortgage in fee, before the marriage. The husband thought this circumstance would not deprive the plaintiff of the right of a wife, and has therefore only given her, by his will, his carriage and horses. Although the current of opinion has been against the claim, there has been no determination that a wife shall not have dower of an equity of redemption. As to a trust term, in *Williams v. Wrey*, 1 P. W. 137. Lord Keeper *Wright* refused to aid the dowress, by removing the trust term out of her way; but his decree was reversed by Lord *Harcourt*. In *Lady Radnor v. Vandebendy*, Show. P. C. 69, *Vandebendy* was a purchaser; and on that ground might defend himself against the widow's right of dower. Equity goes so far as to remove legal obstacles out of the way; but the claim is of so precarious a nature, that a purchaser shall not have a term taken from him. But there is a great opinion in our favor, not shaken yet by any determination, *Banks v. Sutton*, 2 P. W. 700, where two points were made, first, as to the trust-term: second, as to the equity of redemption: this latter has never been overturned; although the former, of the difference between a trust descended, and a trust created, has in the *Attorney-General v. Scott*, For. 138. A mortgage in fee is in equity considered as nothing more than a pledge; and shall only be liable to the burthen of the mortgage money. In all other respects, the mortgagor has the same property as before; so in the case of a revocation of a will, the mortgage is only a revocation *pro tanto*, Lord *Lincoln v. Roll*, Show. P. C. 154, because it is only a pledge. It would be strange the doctrine should be different as to dower. Sir *Joseph Jekyl* thought it was not. In *Godwin v. Winsmore*, 2 Atk. 525, the other point only is determined. The *Attorney-General v. Scott* is said to have exploded *Banks v. Sutton*; but there it was a trust estate before the marriage. In *Fletcher v. Robinson*, the case cited there, the man had done every thing that he could do to obtain

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obtain the legal estate. Lord *Hardwicke's* opinion was against Sir *Joseph Jekyl's*, upon trust estates, but not upon an equity of redemption. In *Casborne v. Scarfe*, 1 Atk. 603, he held, that on a mortgage in fee, previous to the marriage, the husband was entitled to the tenancy by the courtesy. In that case *Penville v. Luscombe* is cited, as determined by Sir *Joseph Jekyl*, that there could be no *possessio fratris* of an equity of redemption; and it is also said, that in the case of *Reynolds v. Messing*, 11th March, 1730, Sir *Joseph Jekyl* determined that there could not be dower of an equity of redemption, and that the same was determined in **Robinson v. Tongue, Michaelmas*, 1730, by Lord Chancellor *King*. The case of *Reynolds v. Messing*, or *Reynolds v. White*, (as it stands in the Register's book) is misrepresented, and does not warrant the point said to be determined by it.

Mr. *Kenyon* and Mr. *Graham* for the defendants.—It is recited as the law of the land, in the preamble to the statute of uses, that one of the evils of uses was, that they prevented dower. We are called upon to shew a difference between a mortgage in fee, and mortgage for years. In the latter case the writ of dower lies; only the judgment is with a *cesset executio* during the term; in the other no writ of dower lies at all.—Dower being a legal demand, the widow can have no right to have it assigned in equity. The attempt to argue this case, is to remove land-marks.

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Lord *Loughborough*.—The argument in the cases cited has generally sprung from compassion. The case of an estate by the courtesy in a trust, is the anomalous case, not the rule that the wife shall not have dower. I confess I think it so much settled, that it would be wrong to discuss it much.

Ashhurst, } Lords Commissioners, of the same opinion.
Hotham, }

Bill dismissed, but without costs, the defendants not praying them(a).

* This point does not appear in any of the reports of this case.

(a) See Sir *Thomas Clarke's* observations in *Burgess v. Wheate*, 1 Eden, 196, et seq. upon those cases; also Sugd. *Gilb. on Uses*, 48.

(b) BOWKER and others, next of Kin of FRANCES BAYLEY, Widow, - - - - - } Plaintiffs.

HUNTER and EATON, Executors of the said FRANCES BAYLEY'S Will, - - - - - } Defendants.

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2 Dick. 605.

15 Serj. Hill's

MSS. 347.

18 Do. 85. 231.

In Co. Hil. 1783,
before Lord
Thurlow.

In Court, Mich.
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Lords Commis-
sioners, Lord
Loughborough,
Ashurst, and
Hotham.

Unequal legacies
given to the exe-
cutors, by their
own names, they
shall nevertheless
take the residue.

FRANCES BAYLEY being possessed of a considerable personal estate, 21st January, 1777, made her will, containing *int. al.* the following words: "And as to that temporal estate, wherewith it hath pleased God to bless me, I give and dispose thereof in manner following:"—She then gave to *Thomas Vickers Hunter*, Gent. (one of the defendants) the sum of £200; and after a great many legacies to a variety of persons, among whom were some of (but not all) the plaintiffs, the next of kin, she gave to the Rev. *James Eaton* (the other defendant) the sum of £50, and after some charitable legacies, she appointed *Thomas Vickers Hunter* and *James Eaton* executors, but made no disposition of the residue. And the executors having proved the will, the plaintiffs filed this bill for an account of the residue of the testatrix's estate, and praying that, the executors having legacies, it might be distributed. The defendants admitted assets more than sufficient to pay debts, legacies, and funeral expences; but insisted that they had a right to her personal estate, there being nothing inconsistent with such right in the will, or indicative of a contrary intention; the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them, by which the testatrix shewed she meant to dispose of the whole, and not to die intestate as to any part thereof.

Heard 28th January, 1783.

Mr. *Attorney-General* and Mr. *Hollist* for the plaintiffs, cited *Brasbridge v. Woodroffe*, 2 Atk. 608, and *Andrew v. Clarke*, 2 Ves. 162. That since the case of *Foster v. Munt*, (1 Vern. 473,) where a legacy is given to the executor, he shall not have the residue; and that it is so, notwithstanding the legacy is not expressly given for care and pains.

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Lord Chancellor.—The simple question is, whether the giving legacies to the executors will turn them into trustees; though the legacies being unequal will point out a different view, and they will take differently, as the residue will go to them jointly.

(b) *Nourse v. Finch*, post, vol. iv. 239. *Clennell v. Leathwaite*, *Thornton v. Tracy*, 2 Ves. jun. 465 and 644.

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Mr. *Solicitor-General* for defendants—to shew that they were not excluded by these legacies, cited *Newstead v. Johnston*, 2 Atk. 45, and a case in 4 Bro. P. C. 1, where one executor has a legacy, the other none, neither is barred from taking the residue, though they will by taking equal legacies; unless it appears that the testator has given a specific legacy, and meant no more, the rule of law must prevail.

Mr. *Balguy*, on the same side, cited *Lawson v. Lawson*, in the House of Lords, 28th April, 1777, 7 Bro. P. C. 511, in which Lord *Mansfield* said, that when the legacies to the executors are consistent with taking the residue, there is no implication to exclude them.—*Lady Granville v. The Duchess of Beaufort*, 1 Bro. P. C. 305. *Blinkhorn v. Feast*, 2 Ves. 27. The same principle applies in the present case.

Mr. *Attorney-General* in reply, said—Those cases were exceptions from the general rule, that a wife shall take beneficially, notwithstanding her legacy.—So in the case of infants and specific legatees; but this case was within the rule itself.

Lord Chancellor.—I confess it struck me at first that the general rule did apply to this case, but I now think rather otherwise.—The first consideration is to make the rule systematical, to consider which way the presumption leans. The fundamental presumption which the law makes, is that the appointment of executors is a gift to them of what is undisposed of.—It must be considered abstractedly from any thing interposed; therefore but little can be rested upon the introductory words. It rather turns on the general doctrine.—Where the executor loses the surplus, it is because he is turned into a trustee.—Here the intention is declared in more slender words than in any of the other cases. When the testator gives the executor part by express words, and in the same manner as he appoints him executor, it shews his intent to be different from that expressed by the fact of making him executor.—In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other intention is from making him executor; where it will bear another intent, it will not bar him from taking the residue. The fundamental distinction is established, by laying it down that the rule, *that the executor shall take the residue* must prevail, unless there is an irresistible inference to the contrary (a). Is the gift of unequal legacies purely the gift of part, in the same manner that they are

(a) Lord *Alcanley*, in *Clennell v. Leithwaite*, 2 Ves. jun. 471, alluding to this passage, says, that is not the rule, it must be, as stated in many cases, a strong and violent presumption,

an expression adopted in subsequent cases, particularly *Pratt v. Sladden*, 14 Ves. 197. *Langham v. Sandford*, 2 Meriv. 6.

appointed executors; and is it impossible to assign any other purpose for such a gift than that of barring the residue? If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue, or it may be given for a different purpose. The gift of unequal legacies may have a different ground from the gift of the whole: it may in many events be different,—for instance, if £100 be given to one, and £50 to the other, it may be different, in case of deficiency, from giving the one £50, the other nothing. The implication is, that he must have had a different intent, and that must rebut the equity; therefore the bill must be dismissed, and the rather, on account that the decree of the Master of the Rolls (in *Brasbridge v. Woodroffe*) goes to the point.

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Bill dismissed.

Upon a re-hearing, the cause was re-argued very fully, and all the authorities in the books gone through; but as they are all cited or referred to in Lord *Loughborough's* argument, it is unnecessary to repeat them here.

Lord *Loughborough* delivered the opinion of the Court.—All that is material to state of the will of the testatrix is, that it contains a great many legacies to persons, several of whom are her next of kin; among the other legatees are *Hunter* and *Eaton*, who are afterwards appointed executors. The bill is filed by the next of kin for the surplus. The executors contend that there is nothing in the will to prevent their taking it, they have unequal legacies, which amounts to the same as if there was a legacy only to one of them. This is a re-hearing from a decree of Lord *Thurlow's*, who held the executors to be entitled to the surplus. In stating the opinion of the Court, which is in affirmance of Lord *Thurlow's* decree, I shall state very generally the grounds on which it seems to rest. By law the executor takes the whole. This is the common opinion of the world, but however that may be, it is certainly the legal meaning, that where the law casts the property there ought to be something certain to take it away. That there may be circumstances to turn the executor into a trustee appears from the subsequent cases, *Foster v. Munt*, 1 Vern. 473. *Pring v. Pring*, 2 Vern. 99. *Cordel v. Noden*, 2 Vern. 148, were all decrees that the executors should be trustees for the next of kin, without any expression of a trust. In all of them the executors had legacies, but the question did not turn upon the legacies alone, but upon express words, to shew they were only to have the office, not to take the surplus. The legacies were for care and pains which the testator intended should be repaid. *Cordel v. Noden* was particular, for the decree was for the persons who claimed under the will.—Thus it stood in 1690, but the

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the point soon proceeded further, for in *Petit v. Smith*, 1 P. W. 7. and in *Lord Bristol's Case*, 2 Vern. 645.—(see 3 P. W. 194. note)—it was so held upon the legacy alone, upon the idea that the gift of a part excludes that of the whole, and, from that time, this has been treated as settled, insomuch, that upon a doubted case, Mr. *Vernon*, an old practitioner, said he considered it as a settled point. This is an established rule, but must be considered as a positive rule. Several exceptions have been taken from it. First, where the gift to the executor was only an exception out of another legacy, as in the cases of *Griffith v. Rogers*, Pr. Ch. 231. and *Lady Granville v. The Duchess of Beaufort*, 1 P. W. 114.—Where there has been a specific instead of a pecuniary legacy, a distinction has been attempted to be taken, *Southcote v. Watson*, 3 Atk. 226. but I cannot find that it has prevailed.—Another distinction is as to the quality of the gift, as in *Ball v. Smith*, 2 Vern. 675. where the specific thing given had belonged to the wife before the marriage: and in the late case of *Lawson v. Lawson*, where it was of a *chose* in action, which was hers, and never had been reduced into possession.—Another distinction has been made upon the condition of the legatee, as where the executor was the wife, or near relation of the testator, and the next of kin remote; but that distinction, though it has prevailed in some cases, has in others been over-ruled, 1 P. W. 549. 552*.—Another, where there has been a legacy to the executor, and also to the next of kin; that succeeded in one case, *Attorney-General v. Hooker*, 2 P. W. 338. but has since been denied. *Davers v. Davers*, 3 P. W. 40. and *Andrew v. Clarke*, 2 Ves. 162.—Another difference has been taken where there were two or more executors, and a legacy given to the one, but nothing to the other, *Buffar v. Bradford*, 2 Atk. 220. There the intent has been apparent to prefer the one to the other, and there being no presumption in favour of the next of kin as to the one, there has been held to be none as to the other. From all these various distinctions a general conclusion has, in late times, been laid down, that where the legacy is consistent with the intent of the executor's taking the whole, it shall not exclude him from it. *Lawson v. Lawson*, *ubi supra* by Lord Mansfield. The reasoning is fair, though I confess the rule has great latitude, and a good deal of uncertainty; but it is doubtful whether it can be drawn with more certainty after the points which have been determined; viz. First, that the appointment of an executor is a gift to him of the whole. Secondly, that a legacy given to him excludes him from the surplus. I doubt whether, after these points have been settled, a more certain rule can be laid down. The case now before the Court is a case where there are legacies to both the executors, but of different sums. If you try the effect of this, and the giving one of them a legacy and the other none, in every possible way,

* See also *Martin v. Ribow*, May 7, 1782, ante, 154.

it will be the same to the executors and to the testator's assets; and may therefore be fairly said not to give the idea of confining the bounty of the testator as to the residue. I acknowledge I do not find the ground of reasoning from the cases so strong as to resist authorities, and therefore if there was any satisfactory case cited, I should have thought it safer to have rested on authority, than to have innovated from my own reasoning. With respect to the cases cited for the executors; *Newstead v. Johnson*, 2 Atk. 45. was cited as a case of unequal legacies, and the executors taking the surplus; but Lord *Hardwicke*, in his notes, says he decided that case on the principle of *Griffith v. Rogers*, and *Lady Granville v. The Duchess of Beaufort*.—*Buffar v. Bradford*, 2 Atk. 220. That is a legacy to one executor and none to the other, though there was a devise with limitations, under which he was interested. *Blinkhorn v. Feast*, 2 Ves. 27. 1 Wils. 285. *Burn's Ecclesiastical Law*. It is said, as to this case, that they were specific legacies, but that distinction was not relied upon by Lord *Hardwicke* in *Southcote v. Watson*, 3 Atk. 226.—but, on the contrary, rejected. Whether it is a good distinction I do not now say, but if Lord *Hardwicke* held the same opinion at the time of the two determinations, that circumstance could not weigh in *Blinkhorn v. Feast*. *Brasbridge v. Woodroffe*, 2 Atk. 68. as it stands, is a determination that the difference of the legacies repels the presumption in favour of the next of kin. It has been said the Master of the Rolls relied upon *Batchelor v. Searle*, which does not apply. It is Atkyn's note of what the Master of the Rolls relied upon. *Batchelor v. Searle*, as reported in 1 Eq. Ca. 246, (where it is best reported) it is true, goes upon proofs, but the Court also goes into reasoning, which is the same with that in *Brasbridge v. Woodroffe*. The result of the whole is, that the cases are not so certain as to be said to be an authority in point. If those on the other side had come up to the matter, I should have been in great doubt. One case in point would have varied my opinion. Three cases have been cited, *Darwell v. Bennet*, *Bailey v. Mead and Powell*, and *Vachel v. Jeffries*. *Darwell v. Bennet*, 2 Vern. 677. I lay out of the case, as being decided upon evidence. *Bailey v. Mead and Powell*, Pr. Ch. 92. 2 Vern. 361. is very inaccurately reported both in *Precedents in Chancery* and in *Vernon*. It struck me as strange in that case, as it stands in *Precedents in Chancery*, that the executor should be made to pay the costs. Mr. *Hollist* went to the Register's book. Upon looking into it myself, it was impossible to decide otherwise. There were legacies to most of the next of kin, and to their children. *Mead's* children had legacies, the executors also had legacies, though unequal, one £50, the other £20. The executors had represented to the next of kin that there would be no residue; *Powell* had arrested *Bailey*, one of the next of kin, for a debt due to the testatrix; and had, upon remitting the debt, and a promise of £30 (of which he paid him only £10) obtained from him a release;

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lease; by some means *Bailey* got the release again, and destroyed it; by other representations *Powell* obtained releases from the other next of kin.—After this *Bailey* attacks the executors, *Mead* assigned a moiety (the whole being £700) to the next of kin, *Powell* was indebted to the testatrix £350. The prayer of the bill was to set aside the releases. *Powell* insisted, in his answer, upon parol evidence, and undertook to prove the testatrix's intent that the surplus should go to the executors; he also insisted that the debt was discharged by his being appointed executor. *Mead* acknowledged, in his answer, that he had aided *Powell* in this scheme; but that being of opinion the next of kin ought to have the surplus, he had assigned it to them; he acknowledged that he had drawn the will, and that no direction was given as to the surplus. *Powell* filed a cross-bill, insisting upon the releases. The decree was, that *Powell* should pay the debt, the residue be distributed, and that *Powell* should pay costs.—Thus stated, the case does not apply to this point, being under very peculiar circumstances, and it being certain the testatrix intended the executors nothing beyond their legacies.—In *Vachel v. Jeffries*, Pr. Ch. 169. to be found faithfully stated in Mr. *Brown's* book, (1 Bro. P. C. 167.) it is true, that in fact the executors had unequal legacies, and that the residue was decreed to be distributed, but that was not the point on which the case was determined: I fancy (but it is only my own supposition) the executors had disclaimed: the question was between the acknowledged children and the others, and the only point was, whether the distribution should be among all, or should exclude the two who had only £10 each given them. No question could occur there that went to this point. Being relieved from any difficulty that could arise from these cases, it remains that the cases, such as they are, are in favour of the executors. I think the safer proceeding will be to affirm Lord *Thurlow's* decree, which will throw this case into the line of those determinations which have proceeded on the distinction, without overthrowing those where a legacy is given *simpliciter* to the executor (a).

(a) The subsequent cases in which this subject has been discussed, where there has either been but one executor to whom there was a legacy, or several executors to whom equal legacies were given, are *Nourse v. Finch*, post, vol. iv. 239. *Holford v. Wood*, 4 Ves. 76. *Dicks v. Lambert*, ib. 728. *Nisbett v. Murray*, 5 Ves. 149. *Muckleston v. Brown*, 6 Ves. 64. *Griffiths v. Hamilton*, 12 Ves. 298. *Dawson v. Clark*, 15 Ves. 409. affirmed 18 Ves. 247. *Lungham v. Sandford*, 17 Ves. 435. affirmed 2 Meriv. 6. *King v. Denison*, 1 Ves. & Bea. 277. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294. *Southouse v. Bate*, ib. 396.

The cases where the question has been, whether the executors are not precluded from taking any beneficial interest, either by words creating a trust not declared; by some remuneration given for their trouble; or by other circumstances inconsistent with the supposition of an intention on the part of the testator that they should take beneficially, are *Wilson v. Wombwell*, 2 Dick. 477. *Batteley v. Windle*, post, vol. ii. 31. *Dean v. Dalton*, ib. 634. *Lowson v. Copeland*, ib. 156. *Bennet v. Bachelor*, post, vol. iii. 28. 1 Ves. jun. 63. *Clennell v. Leathwaite*, 2 Ves. jun. 463. 644. *White v. Evans*, 4 Ves. 21. *Mordaunt v. Hussey*, ib. 117. *De Mazar*

Mazar v. Pybus, 4 Ves. 644. *Urchhart v. King*, 7 Ves. 225. *Milner v. Slater*, 8 Ves. 295. *Sadler v. Turner*, ib. 617. *Seley v. Wood*, 10 Ves. 71. *Williams v. Jones*, ib. 77. *Pratt v. Sladden*, 14 Ves. 193. *Lord Cranley v. Hale*, ib. 307. *Paice v. the Archbishop of Canterbury*, ib. 370. *Daisson v. Clark*, cited ante. *Southouse v. Bate*, cited ante. *White v. Williams*, 3 Ves. and Bea. 72. *Giraud v. Hanbury*, 3 Meriv. 150.

The cases where there are several executors, and they have either unequal legacies, or some of them only have legacies, are *Oliver v. Frewin*, post, 590. *Frewin v. Rolfe*, post, vol. ii. 220. *Sadler v. Turner*, cited supra. *Williams v. Jones*, cited supra. *Rawlings v. Jennings*, 13 Ves. 39. As to the admission of parol evidence to rebut the equity of the next of kin, vide *Nourse v. Finch*, post, vol. iv. 459, and the Editor's note to it.

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THIS bill was filed by *Thomas and Martha Hawkins*, children of *Grace Hawkins*, against the defendant *Combe* (executor of the surviving executor of the will of *Thomas Strode*) and against *William Hawkins* and *Grace* his wife, (father and mother of the plaintiffs) for the interest made of the third part of the residue, bequeathed as under, since the plaintiff *Thomas* attained his age of twenty-one years.—*Thomas Strode*, by will, dated 16th of *March*, 1757, gave the residue of his personal estate to trustees, to pay the legacies given by his will, and after payment thereof, as to two-third parts thereof, for the benefit of two of his nieces, in the manner therein mentioned, and as to the other third part in trust, to lay out and invest the same in securities; and from time to time, during the joint lives of his niece *Grace*, the wife of *William Hawkins* (the defendant) and of *William Hawkins* her husband, or until some one of the children of his said niece should attain his or her age of twenty-one years, to lay out the interest, dividends, and proceeds thereof, in like manner, to accumulate for the benefit of the issue of his said niece, or such other persons as were thereafter mentioned: it being his intent that his said niece, during the life of her said husband, or her said husband, should not receive or be benefited by any part of his estate; and in case she should survive her said husband, and should have issue by him, or any future husband, under twenty-one years of age, testator directed that the trustees should pay the interest, &c. to her or to some other person, to the maintenance and education of such children, until they should attain their respective ages of twenty-one years; and upon their respectively attaining their ages of twenty-one years, upon trust to pay and transfer the funds and all arrears to all and every the children, in equal shares and proportions; and if there should be one child only, to that one child at twenty-one years of age. And in case his said niece should survive her said husband, and have no issue then living by him, or

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ber.

Lords Commis-
sioners, *Ashurst*
and *Hothum*.

T. S. gave the residue to trustees, int. al. to lay out one-third part in securities, the interest to accumulate for the benefit of the children of his niece—and, if she should survive her husband, and have issue under 21 years of age, the trustees were to apply the interest for their maintenance till 21, and upon the children attaining their ages of 21, equal shares of the principal to be transferred to them: the interest accrued between the elder and the younger children coming of age, decreed to be divided between them.

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having such issue, such issue should die under twenty-one years of age, then to pay the interest to *Grace Hawkins* for life, with remainders over, and made the trustees executors.—The plaintiff, *Thomas Hawkins*, attained his age of twenty-one in 1775, and *Martha Hawkins* her age of twenty-one in 1782.—Bill prayed, that the rights of the plaintiffs might be ascertained, and that if the plaintiffs were entitled to the interest and dividends of the bank annuities, &c. accrued since *Thomas* came of age, the same might be paid to them; and the only question was, whether the interest vested in such children as should be living when the eldest attained his age of twenty-one years.

Lord Commissioner *Ashhurst* this day delivered his own opinion, and that of Lord Commissioner *Hotham*.—He stated the will as above, and said—the bill does not contend as to the vesting of the legacies: the only question is as to the disposition of the interest and dividends. It seems the testator had conceived a displeasure at his niece, *Grace Hawkins*, having made an imprudent match, and therefore intended she and her husband should not be benefited by his estate; but that intention did not extend to the children.—He therefore intended the interest to accumulate until some one of the children should attain the age of twenty-one years. But if somebody was to take the interest at that time, the accumulation then ceasing. Who could take it but the person who would be entitled to the principal? I do not mean that the plaintiff *Thomas* became entitled to the whole dividends upon his coming of age, but that the plaintiffs became entitled to equal moieties.—As the accumulation ends there, the other moiety must ensue the principal, which will be in the other child: although the principal was contingent till they came of age, that could not prevent the dividends from vesting.—The case of *Nicholls v. Osborn*, 2 P. W. 419, is very strong as to this point, that the child who would take the contingent interest should take the dividends in the mean time. That of *Shepherd v. Shepherd**, cited by Mr. *Mitford*, is directly in point.—Declared therefore, that the interest accrued since *Thomas* attained his age of twenty-one belongs to, and is divisible between the plaintiffs, in equal shares, and should be so paid to them, and the future interest and dividends in the same manner; with liberty to the parties to apply as there should be occasion (a).

* Reported (by the name of *Gibson v. Lord Montford*), 1 Ves. 485.

(a) Vide *Chaworth v. Hooper*, ante, p. 80.

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December 22, 1783.—The Great Seal was restored to Lord *Thurlow*, as Lord Chancellor; who sat the next day to hear the remainder of the petitions which had been set down before the Lords Commissioners.

HILARY TERM.

24 GEO. III. 1784.

EDWARD Lord THURLOW, Lord High Chancellor.
 Sir THOMAS SEWELL, Knight, Master of the Rolls.
 LLOYD KENYON, Esq. Attorney-General.
 RICHARD PEPPER ARDEN, Esq. Solicitor-General.

Countess Dowager of SHELBURNE, and JOHN
 HAMILTON FITZMAURICE, an Infant, only Son } Plaintiffs;
 of the Honorable THOMAS FITZMAURICE, and
 Lady MARY his Wife, (two of Defendants)

MOROUGH Earl of INCHQUIN, and MARY
 Countess of ORKNEY and INCHQUIN, his } Defendants.
 Wife; and said THOMAS FITZMAURICE and
 Lady MARY his Wife, and others.

THE late Earl of *Shelburne*, by his will, dated 5th *April*, 1756, gave all his lands, both in *England* and in *Ireland*, to plaintiff, *Mary* Countess of *Shelburne*, his wife, for her life, in case she did not marry again; and after her death unto all or any of such one or more of his the testator's children, or grand-children, for such estates and interests, and in such shares and proportions, &c. as the plaintiff should by deed or will appoint: and in default of such appointment to his second son, the defendant, *Thomas Fitzmaurice* in fee. On the marriage of Lord *Inchiquin* with Lady *Orkney*, several estates in *Oxfordshire*, of the said Lord *Inchiquin*, of the yearly value of £1,500, and in *Buckinghamshire*, of the yearly value of £1,100 were settled on Lord *Inchiquin* for life, remainder to Lady *Orkney* for life, remainder to the issue of the marriage in tail general. Lady *Mary Fitzmaurice* is the only child of the marriage.—Lady *Mary Fitzmaurice*, then *O'Brien*, being come of age in 1776, and the father, Lord *Inchiquin*, being considerably in debt, Lady *Mary* joined in suffering a recovery of the *Oxfordshire* and *Berkshire* estates, the uses of which were declared to be to Lord *Inchiquin* in fee, in order that the same might be sold and applied in payment of his debts; and in *July* 1777, they were accordingly mortgaged by Lord *Inchiquin* for two several sums of £20,000 and £4,000.—A marriage being in contemplation be-

Lady *Mary Fitzmaurice* having joined her father, the Earl of *Inchiquin*, in raising £24,000 to pay his debts; afterwards, [339] upon her marriage, a settlement being made, by which £30,000 was to be raised for the payment of the Earl of *Inchiquin*'s debt. It was determined by the Court, and affirmed in parliament, that the £24,000 should be taken in part of the £30,000 and not raised beyond it.

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tween said *Thomas Fitzmaurice* and *Lady Mary*, by articles of agreement, bearing date the 17th of *December*, 1777, between the plaintiff *Lady Shelburne* of the first part, said *Thomas Fitzmaurice* of the second part, the said *Earl of Inchiquin* of the third part, said *Lady Mary*, then *Lady Mary O'Brien*, of the fourth part, and *Henry Dagge* and *John Patterson*, of the fifth part; it was, in consideration of marriage, covenanted and agreed in manner therein-mentioned; and *Lady Shelburne* did on her part covenant and agree to limit and appoint (in pursuance of the power given to her by the said late *Earl of Shelburne's* will) to the said *Thomas Fitzmaurice* and his heirs, certain lands in *Ireland*, of the yearly value of £3,000 and upwards, part thereof immediately in possession, and other parts thereof to him after her decease.—And the said *Thomas Fitzmaurice* covenanted and agreed with the said *Dagge* and *Patterson*, as soon after the execution of such deeds by *Lady Shelburne* as conveniently might be, to convey and assure to them the said *Dagge* and *Patterson* all his estate, right, and interest in the said *Irish* premises, in trust for himself for life, remainder to *Lady Mary* for life, for her jointure, remainder to first and other sons in strict settlement. And the said *Earl of Inchiquin* and *Lady Mary* did, on their part, covenant and agree with *Dagge* and *Patterson* to convey and assure to them the said estates in *Oxfordshire* and *Buckinghamshire*, in trust, by a mortgage of the whole, or any part thereof, in fee, or for a term of years, to raise the sum of £30,000 towards discharging the then present debts and incumbrances of the said *Earl of Inchiquin*, and subject thereto, and also to the payment of £1,000 *per annum* to the defendant the *Countess of Orkney* for her life, to the said *Thomas Fitzmaurice* for life, remainder to *Lady Mary* for life, remainder over to their first and other sons in strict settlement.—The marriage took place, and in *June* 1778, the *Earl of Inchiquin*, and *Thomas Fitzmaurice*, and *Lady Mary*, joined in suffering a common recovery of the *Buckinghamshire* estate, to the use of such person or persons as they should jointly appoint; and by indentures of the 26th and 27th of *June*, 1778, the said *Earl of Inchiquin*, *Mr. Fitzmaurice*, and *Lady Mary*, appointed the said *Buckinghamshire* estate to trustees, for two thousand years, in trust to raise by sale or mortgage of the said term, the sum of £23,000 to be paid to *Lord Inchiquin*, and subject thereto to *Lord Inchiquin* for life, remainder in trust to pay *Lady Orkney* £1,000 *per annum* for life, remainder to *Mr. Fitzmaurice*, and *Lady Mary*, and the survivor in fee. The present bill alledged, that the plaintiff, *Lady Shelburne*, had no notice of the former incumbrance of £24,000 on the *Oxfordshire* estate, and therefore prayed that the said articles might be carried into execution, and that it might be declared that the said sum of £24,000 was to be considered as part of the £30,000 provided by the said articles, towards paying *Lord Inchiquin's* debts and incumbrances—and that

that the indentures of the 26th and 27th of *June*, 1778, might be rectified by restraining the trust of the term of two thousand years to the raising the sum of £6,000 and by letting in limitations to the issue male and female of said *Thomas Fitzmaurice* and *Lady Mary* in tail male, &c. according to the articles.

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Mr. *Attorney-General* and Mr. *Hollist* for the plaintiff, insisted—that, on the face of the articles, only £30,000 was to be raised upon Lord *Inchiquin's* estate.—That the plaintiff had no notice of any prior incumbrance, and that she entered on the treaty with the idea that that was to be the sole charge upon the estate.

Mr. *Solicitor-General*, *Ambler*, *Scott*, and *Lloyd*, for the defendant Lord *Inchiquin*, offered to read the evidence of Mr. *John Patterson*, to prove that the plaintiff had notice of the prior incumbrance of £24,000, and that it was the intent of all parties that the £30,000 should be raised over and above the £24,000—which being objected to, as tending to contradict a written agreement by parol evidence—it was contended for the defendants, that this evidence does not go to contradict, but to explain the articles.—The articles themselves do not import that the £30,000 is to be the only charge upon the estate—but if otherwise, on the ground of mistake, parol evidence is to be admitted.—It is certain that this Court will relieve against either fraud or mistake—for either of these purposes there must be parol evidence.—In many instances this Court has been more liberal in admitting parol evidence in the case of articles, than it would have been in the case of deeds.—Articles are merely the heads of the parties meaning; and therefore in the case of articles, the meaning must be resorted to at all events.—Even in conveyances the Court will receive parol evidence, where the words will admit of two meanings, or where the extent is doubtful; but in articles, which are executory, the Court has nothing to resort to but the meaning.—And the only case in which they could refuse to hear parol evidence as to articles, is where it goes to contradict flatly the whole substance of them;—but in this case it goes to support the plain meaning of the words, or at least to explain doubtful words.—*Eden v. Lord Bute*, 7 Bro. P. C. 204—445. *Uvedale v. Halfpenny*, 2 P. W. 151. *Goman v. Salisbury*, 1 Vern. 240. *Pitcairn v. Ogbourne*, 2 Ves. 375, and the cases there cited. *Legal v. Miller*, 2 Ves. 299. *Baker v. Paine*, 1 Ves. 456. *Brown v. Selwin*, For. 240.

Parol evidence of the attorney admitted, to prove a party to a settlement [341] had notice of a prior incumbrance.

On the part of the plaintiffs, it was insisted that this evidence, if admitted, would clearly contradict the written agreement, inasmuch as it would prove that £54,000 should be raised on the estate, instead of £30,000; that this was a case of articles on marriage, and was clearly within the statute of frauds.

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Lord Chancellor.—I think it is impossible to refuse, as incompetent, parol evidence, which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties. To be sure it must be strong irrefragable evidence, but I do not think I can reject it as incompetent. It is the only way of explaining latent ambiguities. So if there are two manors of *Dale*, you must make out that fact by parol evidence; and if you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity. So parol evidence of the actual situation of the subject spoken of is introduced into this Court to make the deed intelligible; but if the words themselves are intelligible, there is no instance where parol evidence has been admitted to explain them into a more vulgar sense, and clearly into an ungrammatical one.—The case in the House of Lords was a very nice one, and rather against my opinion, though I had great doubts about it.—I think the evidence here must be admitted.

On reading Mr. *Patterson's* evidence, the substance of it appeared to be this:—That he was employed by Lady *Shelburne* in the way of his profession, and particularly as her law agent in several of her affairs.—On the 30th of *November*, 1779, he was first informed by Mr. *Fitzmaurice* of his being in treaty with Lord *Inchiquin* for a marriage with Lady *Mary*, and was by him desired to wait upon his mother, to know what part of her estates she was willing to settle upon the said marriage.—The next day, being the 1st of *December*, he waited upon Lady *Shelburne* for that purpose, when she expressed the highest opinion of Lady *Mary*, and her own readiness to promote a match so agreeable to her son, although the terms thereof did not appear to be so advantageous for her son as, in her opinion, a man of his fortune and expectations might reasonably demand; from which expression, deponent was induced to believe that Lady *Shelburne* had been fully apprized of the terms proposed on the part of Lady *Mary*.—Lady *Shelburne* then agreed to settle the premises mentioned in the articles, and deponent took down in writing what Lady *Shelburne* said on that subject.—On the 14th deponent was desired by Lord *Inchiquin* and Mr. *Dagge* to prepare the articles.—On the 15th deponent prepared them, and in the evening read them to Lord *Inchiquin*; on the 16th to Mr. *Fitzmaurice*; and in the afternoon went with them to Lady *Shelburne's*, with *George Black*, Mr. *Fitzmaurice's* secretary; and from the instructions given by Lady *Shelburne*, filled up and completed the said draft: and *George Black* made out two fair copies on stamped paper, which were read over to Lady *Shelburne*, and by her signed, sealed, and delivered, about one o'clock in the morning of the 17th, in presence of deponent, *George Black*, and her Ladyship's servant. That at the time of this deponent's drawing the said articles, he understood from the conversation which passed between Lord *Inchiquin*, Mr. *Fitzmaurice*,
and

and deponent, that the *Oxfordshire* estate was already incumbered with mortgages to the amount of £30,000 and upwards; and that it was intended to charge that estate, together with the *Buckinghamshire* estate, with a further sum of £30,000, for the purpose of discharging Lord *Inchiquin's* then present debts and incumbrances, particularly several of Lord *Inchiquin's* engagements for *post obit*, and other annuities, which deponent then understood amounted to a considerable sum. That Lord *Inchiquin* not being satisfied with the money agreed to be raised for him by the articles, and Mr. *Fitzmaurice* being desirous to extricate Lord *Inchiquin* from his difficulties, deponent made a proposal in writing to Lord *Inchiquin* and Mr. *Fitzmaurice*, thereby reciting that the incumbrances, at the time of marriage, amounted in all to £30,000. That £30,000 more was to be raised by the articles, and that Lord *Inchiquin* wanted £5,000 more; it was proposed that £65,000 in all should be raised in manner therein mentioned; but Lord *Inchiquin* not being then satisfied, it was afterwards agreed between Lord *Inchiquin* and Mr. *Fitzmaurice*, that beside the two sums of £30,000 a further sum of £8,000 should be raised.—Mr. *Orme* and Mr. *Dagge*, in substance, confirmed Mr. *Patterson's* evidence. Mr. *Dagge* added, that he had been present at several meetings between Lord *Inchiquin* and Mr. *Fitzmaurice*, previous to the articles, where Lord *Inchiquin* told Mr. *Fitzmaurice* of all the incumbrances affecting the *Oxfordshire* estate, and the whole situation of his affairs; but when *Patterson* brought the draft of the articles to deponent, deponent observed to him that the incumbrances already affecting the *Oxfordshire* estate should be noticed in the draft, and deponent then gave *Patterson* some words on a slip of paper, to be inserted for that purpose, which were, “which estate in *Oxfordshire* is now charged with £30,000 by several mortgages thereon;” and *Patterson* agreed that such words should be inserted. Deponent expected to have the draft shewn to him again with such insertion, but was informed the next day, that *Patterson* had carried the said articles to Lady *Shelburne* to be executed; that *Patterson* afterwards acknowledged to the deponent, that he considered the words made use of in the articles as sufficient to convey the meaning of the parties.

It was then insisted on the part of the defendant, Lord *Inchiquin*—First, that it appeared, by the words of the articles themselves, that the £30,000 was to be raised over and above any incumbrances then affecting the estate.—Secondly, that the words were at least doubtful, and therefore a proper case for the admission of the parol evidence now offered.—Thirdly, that this parol evidence is decisive in favour of the defendant. As to the first,—it is the natural import of the words of the articles; they covenant to convey to trustees in trust, to raise the sum of £30,000.—The agreement was made about an estate then subject to a charge. The estate so subject was the subject-matter of the bargain; that

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was all they had to go to market with.—The former incumbrances were raiseable without the help of these articles, and therefore, if they mean any thing, they mean that £30,000 more should be raised over and above the incumbrances then affecting the estate. Every man is presumed to look into the title of the estate about which he is contracting; and on that ground it is to be presumed that these parties knew that the estate, about which they were then treating, was an incumbered estate.—If Lord *Inchiquin* had pretended to be entitled to the estate, free from all incumbrances, the plaintiffs would have come into this Court with a good case; but not so on the face of the articles by any means: for the words of the articles by no means import that the £30,000 is the only sum raised or to be raised on the estate.—On the whole, therefore, the words of the articles are with the defendant.—But, secondly, the words are at least doubtful, and therefore it is a proper case to admit the evidence we have to adduce; for the doubt being whether the parties meant to add this incumbrance to the others before affecting the estate, or whether they considered themselves as contracting about a clear estate, it is surely very proper to prove that the parties at the time knew the estate to be incumbered. So it will be proper to admit it on the ground of a mistake, if it shall appear that the words in the articles were contrary to the concurrent intention of the parties, and what was actually agreed upon by them.—As to the statute of frauds, this Court, in many cases, particularly in the case of fraud, will give relief even against a conveyance without any declaration of trust, notwithstanding the statute. *Hutchins v. Lee*, 1 Atk. 447. *Young v. Peachey*, 2 Atk. 254, and 2 Eq. Ab. tit. *Agreement*, &c.—So if an agreement is by fraud prevented from being reduced into writing, the Court will relieve, notwithstanding the statute. So in one case, on surprise purely, which is *South Sea Company v. D'Oloff*, cited 2 Ves. 376. And the case of a defendant is much more favoured than that of a plaintiff; for, as defendant, we can set up a parol agreement, waiving a written one, though, as plaintiff, we could not carry a parol one into execution.—Then, thirdly, as to the effect of the evidence, all the parties who were present when the articles were agreed upon, clearly knew the situation of the estate.—And we contend that knowledge bound all the parties concerned.—The infant was bound by the knowledge of the contracting parties; for his interest arose merely under those articles.—Lady *Mary* was bound by the contract made by the father.—In all marriage contracts the agreement is made by the parents on behalf of their daughter, and the daughter herself never stands forward in the business.—She was of full age at the time, and has never complained, nor does she now. And she has done all that she could do as a *feme covert*, to confirm the articles, by suffering a recovery.—Mr. *Fitzmaurice* clearly knew the situation of affairs, and so did Mr. *Patterson*. The only doubt is as to Lady *Shelburne's* being

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being bound; but Mr. *Patterson* clearly acted as agent for Lady *Shelburne* in the business—nobody else appeared on Lady *Shelburne*'s part; and if so, the fraud or negligence (whatever it may be) of the agent, must bind the principal. At any rate Mr. *Patterson* appeared in the business, as being authorized by Lady *Shelburne* to treat; and so Lord *Inchiquin* understood him to be. He treated with him, upon the confidence that he was treating with the agent of Lady *Shelburne*; and thought that every circumstance was communicated to her. Lord *Inchiquin* would never have given his consent on the terms which the plaintiffs now insist upon: He was tenant in fee of the *Oxfordshire* estate, which was valued at £45,000, and there was an incumbrance of £24,000 only affecting it. He could not have given up the rest of that estate for £6,000 only. This being the clear intent of Lord *Inchiquin*, and he having communicated this to the only person who appeared for Lady *Shelburne*, it would be very hard upon Lord *Inchiquin* to force him to part with this estate contrary to such intention. If any body must suffer it must be the plaintiff. *Leneve v. Leneve*, 3 Atk. 646.

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Attorney-General in reply.—As to the annual value of the estate, it is exaggerated by the defendant; but computing it at its real productive value, it will be considerably deficient to answer all the charges upon it, if Lord *Inchiquin*'s demands are to be complied with.—The first question has been made on the import of the words themselves: "towards discharging incumbrances," must mean incumbrances then affecting the estate.—But, secondly, they say these will admit of explanation by parol evidence. On minute attention to the case, I cannot think they come home to this. The case of a parol waiver is quite another thing; there, there are two distinct agreements.—But here the evidence goes to prove, that the very agreement never existed. But if admissible, then, thirdly, how far does Lady *Shelburne* appear to be bound; for what Mr. *Fitzmaurice* and Lord *Inchiquin* meant does not affect her. Lady *Shelburne* was a very material contracting party, and Mr. *Patterson* merely carried the terms she proposed, backward and forward. If Mr. *Patterson* was a complete agent, why did he not sign the draft for Lady *Shelburne*? why were not the articles ingrossed in town? where was the necessity of shewing them to Lady *Shelburne* before they were ingrossed? Lady *Shelburne* was certainly bound by the agency, to the extent of such agency; but it went no farther than carrying her terms to Lord *Inchiquin*. He was not intrusted to do any one thing of himself.

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Lord Chancellor.—This is a bill brought by the infant son of Mr. *Fitzmaurice* and Lady *Mary* his wife, to carry articles entered into previously to that marriage into execution, and to restrain a subsequent

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subsequent settlement, to the raising of the sum of £6,000 only. There are two questions raised in this clause; first, whether the plaintiff has a right to his claim, according to the grammatical import of the words of the articles. Secondly, how far is he to be restricted in that claim by collateral circumstances. The first point is very material, for if that will not support the plaintiff, there is an end of the whole. The articles were between Lady *Shelburne* of the first part: Mr. *Fitzmaurice* of the second part: Lord *Inchiquin* of the third part: Lady *Mary* of the fourth part: and the trustees, of the fifth part. Lady *Shelburne* is therein recited, to be entitled to the estates of the late Lord *Shelburne* for life, with a power of appointment; and she thereby covenants to appoint the lands therein mentioned to Mr. *Fitzmaurice*, in fee; and Mr. *Fitzmaurice* covenants to settle them in strict settlement; and Lord *Inchiquin* and Lady *Mary* contract, &c. (as in the articles.)—The first question is, whether, according to the effect of the words, the intention of the parties appears to have been to raise £50,000 only, for payment of Lord *Inchiquin*'s debts and incumbrances, or to raise £30,000 over and above all such incumbrances as might then be upon the estate. In the course of the argument, I have not been able to draw a probable foundation for doubt to arise on the words of the articles only. The first part of the clause purports to be a settlement of those estates. It is argued, that it is usual to insert, "free from all incumbrances," whenever estates are intended to be so settled; but the question is not now what are the ordinary and proper cautions upon those occasions, much less in this case, where those who so argue are found, in every part of the case, to complain of remissness in the execution of the instrument: but the question is, whether there does not arise a definite and precise meaning on the grammatical construction.—My opinion is, that where parties contract to settle estates to given uses, the natural and genuine import is, that the whole estate is to be settled.—But this case does not depend on this construction, for the parties have gone on to say how they mean the estates should be incumbered, for they are vested in trustees for the purpose of incumbering them with £30,000, towards discharging the debts and incumbrances of Lord *Inchiquin*. On the whole of the clause, it is impossible to doubt, that the contracting parties expected that £30,000 only should be raised, and that the estate should go, with that incumbrance only, as a partial discharge of Lord *Inchiquin*'s debts and incumbrances. There is nothing in the instrument that refers to any examination having been made of the actual condition of the estate with respect to incumbrances. It might be fairly contended from the words, that the discharge of some incumbrance, then affecting the estate, was in contemplation of the parties at the time,—for the word "incumbrances" occurs in no other place. In that view the articles are sufficiently distinct, to prove that the intent was, that the charge on the estate should

should be £30,000 only. But then it is argued, that this construction is altered by the subsequent words, "subject thereto;" which are said to imply, that the charges *then* affecting the estate shall remain thereon at all events; on the ground of "debts and incumbrances" being the last antecedents. But these are not properly the last antecedents,—for the antecedent must be a distinct member of a sentence;—but here it is merely a word of description of the extent of the preceding words, "and subject thereto," means only subject to the limitation to trustees so described.—In this state of the case, the circumstance of Lady *Orkney's* interest, and the childrens' interest in the estate, are articles which at present I am not at liberty to enter into, for I am now going on the mere words. But if these circumstances were to be admitted, (and I think it is the proper business of a description of the subject to explain any doubt on the words) they go a great length to shew, that it is impossible to put any other construction on the words; for, according to the evidence of the value, the estate would be insufficient to yield these charges, if Lord *Inchiquin* were right in his demand. On the construction of the articles, therefore, I think the prayer of the bill is properly conceived, and that it is fit to declare against all parties, except the incumbrances, that the estate shall be settled, free from all incumbrances, except the single sum of £30,000.—But then it is said, that the collateral circumstances of the case shall rebut the demand which the plaintiff has, according to this interpretation. The out-lines of the evidence are a history of the treaty, and of the articles from the beginning; and the condition of both Lady *Shelburne's* and Lord *Inchiquin's* estates appears. Under the settlement made on Lord *Inchiquin's* marriage in 1753, Lady *Mary* was tenant in tail.—She came of age in 1776, and, the very next term, she was prevailed upon by her father, to suffer a recovery of the *Oxfordshire* estate to him in fee. It is suggested in the pleadings, as well as at the bar, that the purpose for which she was so prevailed upon to join in the recovery was, to discharge her father's debts; but it is not stated, that the quantity of his debts, or any more specific proposal, was made to her.—Lord *Inchiquin* took the estate in fee, and it is not said that any branch of the family, that could give any degree of authority or propriety to the transaction, was concerned. It has been argued, that I must lay this transaction out of the case; because it has been acquiesced in, and is not now complained of. I have been inclined to lay it out of the case, and to consider this case in an abstract light:—it is more convenient to the policy of justice, that cases should be determined on general principles; I therefore lay it out of the case, except so far as it brings forward this point, (*viz.*) whether Lady *Mary* could impeach this transaction in a court of equity, for if so, she had still some interest in the estate. This question is not now ripe for decision; but it is a material question, whether Lord *Inchiquin* had the same right in equity, as he

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he certainly had at law.—The first step in the business was no earlier than *December*;—then it first appears that Lady Shelburne had been applied to. Lady Shelburne sent a proposal in writing of what she would do; what she said was merely, that the match was not so advantageous as her son might expect, but that she highly approved of Lady Mary's character; and that she would therefore accede to the proposal with such sort of countenance as was expressed in the paper. Mr. Patterson, on oath, draws the conclusion from this circumstance, that Lady Shelburne knew what was in the contemplation of the other parties.—But we must remember that we are now on this part of the case (*viz.*) by what means it is, that an agreement in writing should be changed. What I now say, must be considered as being spoken with that view. Considering what the circumstances of the several parties actually were, to say that it was not probable that Lady Shelburne should make such proposal, and say what she did say respecting the match, without such knowledge of the intention of the other parties, is ridiculous.—It cannot be looked upon as any kind of proof of her being apprized of the terms. On this proposal of Lady Shelburne's, a meeting was had, when the terms now under contemplation were, in some loose and general way, reduced into writing. At this meeting were Mr. Fitzmaurice, Mr. Dagge, Mr. Patterson, and Lord Inchiquin.—And it is said it was the intention of all of them, that there should be £30,000 raised, over and above the incumbrances then affecting the estate. It appears, from the evidence, that there must have been a great deal of conversation on the subject. It was then put to Mr. Patterson, to draw the proposals into some more distinct form, and he was then to shew them to Mr. Dagge; and on the 15th he accordingly shewed them to Mr. Dagge.—Mr. Dagge reminded him of the conversation that had passed, and suggested him the words which he thought ought to be inserted; taking notice of the prior incumbrances. Patterson drew up the articles without inserting the words. The instrument was carried to Lady Shelburne, as correspondent to her instructions, and the circumstance of Lady Shelburne's signing the paper is the only proof of her knowledge of the terms. The paper was carried to Lady Shelburne's on the 16th—and, it should be observed, for what reason it was carried to her in an unfinished state; which was, that Patterson said it was necessary to have a more exact description of the estate which Lady Shelburne was to appoint. Black, who ingrossed the articles, had nothing to do with the law, but was employed merely as writing a good hand. On the 17th they were carried to Taplow.—Now observe who were present when Lord Inchiquin signed—Mr. Orme and Mr. Wallis. Mr. Wallis is, I suppose, the gentleman whom we all know, and who is a very proper person to be consulted on an occasion of that sort. The paper was in fact signed by Lord Inchiquin, and that is all I know of the business: yet it is said, that it was a surprise upon
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Lord *Inchiquin*—how can that be? There is no hint of incapacity in Lord *Inchiquin*, or of any thing like surprise, in the evidence, so that fact is out of the case—and indeed it goes directly the other way: at least Lord *Inchiquin* seems to have executed the articles quite upon as great deliberation as Lady *Shelburne*. Now, under these circumstances, the question was, first, as to the competency; and secondly, as to the effect of parol evidence. I think I could not avoid admitting it; for it is clear, that where an equity is attempted to be raised, founded upon a ground collateral to the contract, there must be evidence, *dehors* the contract, to shew the fact. As when £400 was inserted instead of £500 by the husband, to cheat the wife, and many other cases of the same sort in Eq. Ca. Abr. all of which go on the subject of fraud. Now the moment you impeach a deed for fraud, you must either deny the effect of fraud on the deed, or you cannot but be under the necessity of admitting evidence to prove it. So if two persons intrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved; for that would be a kind of fraud. It must be an essential ingredient to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument. So on the head of ambiguity; if there be a latent ambiguity it must be explained by parol evidence; for though the words do not, *primâ facie*, import an ambiguity, yet if such ambiguity can be made to appear from parol evidence, it must be admitted to explain it, as well as to raise it; but if words have in themselves a positive precise sense, I have no idea of its being possible to change them; and I take it to be an established rule, that words cannot be changed in that manner.—It has been said, in this case, that notice to *Patterson* ought to bind Lady *Shelburne*—I wanted to have this more argued.—It is clear, that if a man purchases an estate, subject to an equity only, if he or if his agent know it, it is a fraud; but when an instrument is signed by all parties, that the intention shall be interpreted contrary to such instrument, by notice to an agent that some of the parties had such intention, is quite beside all the cases. If this then were the fact, it would be impossible to bind Lady *Shelburne* unless she had consented; for employing him to draw out such terms for her into form, is not employing him to make terms for her. Is it making him her attorney to agree to new terms? If therefore it had stood on this ground, I think it would have bound Lady *Shelburne*: but I do not think that it turns upon this; for I do not think that the conversation, however it may now occur to the gentlemen, purported to be a distinct demand of terms, without which Lord *Inchiquin* would not agree to the marriage: and my belief is, that if Lady *Shelburne* had insisted upon her terms, Lord *Inchiquin* would not have insisted upon his. And those very gentlemen are as far from carrying their agreement into execution as Lady *Shelburne*'s; for what they did execute was quite adverse to

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to both, and charged a further sum of money on the estate than was intended by either party, and indeed the case has been opened to me in four or five different ways. There is enough to shew that these circumstances were open and perfectly intelligible between Lord *Inchiquin* and Mr. *Fitzmaurice*: from which another opinion might be entertained, which I have now nothing to do with. Another circumstance is, the very great age of one of the gentlemen who have been examined; his memory very possibly fails him. Under these circumstances it will be too much to put a new sense, and much more a contrary sense, upon the articles, against the interest of the plaintiff: but if this could be done as against Lady *Shelburne*, will it do the whole? The plaintiff, the child, derives two interests—one from Lady *Mary* in the *Oxfordshire* and *Buckinghamshire* estate, whatever it may be. Had Lady *Mary* notice? She joined in the articles, and was bound by the articles, as the rest were. But did Lady *Mary* ever agree to any other terms than what were in the instrument?—and how can the children be bound if she never consented? On the whole, therefore, whether the case is considered on the articles merely, or on the evidence (which I do not think should be admitted to the extent of changing the effect of these articles) or in any other point of view; I cannot deprive the children of their interests under these articles. The articles therefore must be carried into execution, and Lord *Inchiquin* is bound to discharge all incumbrances, on the estate above £30,000.

His Lordship declared, that the articles ought to be specifically performed, and decreed that they should be carried into execution by a conveyance of the estates, to be settled by the Master, and that the mortgage of £24,000 should stand as part of the £30,000 to be raised under the deed.

From this decree Lord *Inchiquin* appealed to the House of Lords, but the printed case of the respondent *John Hamilton Fitzmaurice*, the infant, having stated that the estates in *Oxfordshire* and * *Berkshire* were charged by mortgage deeds, dated the 25th and 26th of *September*, 1777, with the payment of a further sum of £3,000, to the Honorable *George Grimston*; the House of Lords on the 4th of *March*, 1785, ordered the cause to stand over to the 2d of *May*, with liberty for the respondent, the infant, to bring a cross appeal. Under this order a cross appeal was brought, and on *Friday*, the 13th of *May*, 1785, the House of Lords was pleased to order the decree to be amended, to let in the £3,000, and the interest due thereon, as part of the charge of £30,000, and to order the Master to enquire whether the Earl of *Inchiquin* had introduced any other incumbrance upon the estate; and if he should find any, that the residue of the £30,000 should

* The estates called in the former part of the case the *Oxfordshire* estates, were found to comprise some farms in *Berkshire*.

be applied in the payment thereof, and, with these amendments; affirmed the decree (a).

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(a) See the case upon Appeal, 5 Bro. P. C. edit. Toml. 166. As to the

admission of parol evidence, vide *Rich v. Jackson*, post, vol. iv. 514.

OLIVER BECKETT, Esq.

Plaintiff.

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THOMAS CORDLEY, GEORGE IVESON, JOHN IVESON, (a Bankrupt) and MARGARET his Wife; JOHN PRINCE, (Assignee of JOHN IVESON, the Bankrupt) ROSEY IVESON, and THOMAS TAYLOR (a).

Defendants.

BY indentures of lease and release of the 14th and 15th days of June, 1772, George Iveson and his eldest son John Iveson, (both deceased) conveyed the manor of, and lands in, *Bilton*, in the county of *York*, to *Henry Stapleton* and *Thomas Thornton*, and their heirs and assigns for ever, upon trust to sell the same, and with the money thereby arising to pay certain sums amounting to £8,500, and to place out the residue of the money on real securities; and after the said *George Iveson's* death, to pay to the defendants *George Iveson*, *Margaret Iveson*, and *Rosey Iveson*, the younger children of the said *George Iveson*, the sum of £3,000 equally among them, and to pay the residue (if any) of the money arising by such sale to the executors or administrators of the said *George Iveson*. Before any sale was made of the estates *George Iveson* died. After his decease *John Iveson* came to an agreement with the trustees, for the purchase of the trust estates, for the sum of £14,668. 10s. and to enable him to complete his purchase, and to answer other occasions, he procured a loan of £16,000 from *Harriot Amyand*, for which she was to have a mortgage of the said estates; and accordingly, by indenture of twelve parts, dated the 18th of *August*, 1774, whereto the trustees *John Iveson* deceased, *George Iveson*, *John Iveson*, and *Margaret* his wife, and *Rosey Iveson*, were parties; it was witnessed, that, in consideration of the sum of £3,000, paid by the said *Harriot Amyand* to the defendants *George Iveson*, *John Iveson*, and *Margaret* his wife, and *Rosey Iveson*, in full for the sum of £3,000 mentioned in the indentures of the 14th and 15th of *June*, 1772, the receipt of which the defendants did thereby ac-

I. I. being about to mortgage an estate, upon which his younger brothers and sisters had charges, got them to join in the conveyance, and acknowledge the receipt of their portions, giving them an undertaking, that he would grant them a subsequent mortgage, and enter into no prior security. He afterwards makes a subsequent mortgage to plaintiff for money lent before on bond, and a fresh sum advanced: the claims of the younger children have priority in equity, and shall be preferred to plaintiff's mortgage.

(a) This case is nothing but a consequence of a principle, known long before, that equitable claims shall be

paid according to their priority, 2 Ves. 485, 486. 2 P. W. 495, 496. (Serjt. Hill.)

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knowledge, and in consideration of other sums therein mentioned to be paid by the said *Harriot Amyand*, amounting, with the said £3,000, to the sum of £16,000, the trustees, *John Iveson*, deceased, and the defendants, *George Iveson*, *John Iveson*, and *Margaret* his wife, and *Rosey Iveson*, did convey the manor and estates unto the said *Harriot Amyand*, her heirs and assigns, for ever, subject to redemption by the said *John Iveson* deceased, on payment of the said £16,000, with interest. The defendants, *George Iveson*, *John Iveson*, and *Margaret* his wife, and *Rosey Iveson*, also respectively subscribed their names to receipts indorsed on the deed for the sum of £3,000.—*John Iveson* afterwards borrowed of the defendant *Taylor*, £500, with which he also charged the estate.

In the month of *March* 1778, *John Iveson* deceased, being indebted to the plaintiff in £2,400 secured by bond, applied to the plaintiff for a further sum of £1,200, who agreed to lend him the same, provided he would convey the estates to a trustee to sell, and out of the money arising therefrom, to pay the plaintiff such two sums of £2,400, and £1,200, which the said *John Iveson* agreed to do, and to give the plaintiff a mortgage on the estates in the mean time.

By indentures, dated the 30th and 31st of *March*, 1778, the said *John Iveson* conveyed the manor and estates to the plaintiff, subject to redemption on payment of the said sums of £2,400, and £1,200, with interest.—And by other indentures of the 1st and 2d of *April*, 1778, he conveyed the manor and estates unto *Thomas Cordley*, upon trust, to sell, and out of the money arising thereby, in the first place, to pay off the £16,000, secured by the mortgage to *Harriot Amyand*, with the interest; and, in the next place, to pay off the £500 due to *Thomas Taylor*; and in the next place, to pay to the plaintiff the said two sums of £2,400, and £1,200, and the interest due thereon, and to pay the residue (if any) of the money to the said *John Iveson*, or as he should appoint. The plaintiff afterwards lent *John Iveson* other sums, amounting together to £50, and he, by writing, dated the 1st of *January*, 1779, charged the said estates with the payment thereof.

In *Hilary* term 1779, the plaintiff filed his bill against *Cordley*, and others of the parties, to have the trusts of the indenture of the 2d of *April*, 1778, carried into execution: which bill was afterwards amended, by making the *Ivesons* parties.—The defendants, the *Ivesons*, by their answers in the said cause, stated the said first mentioned deeds of the 14th and 15th of *June*, 1772, whereby the said £3,000 was charged upon the said manor and estates for their benefit; and further stated, that *John Iveson* deceased, having agreed with the trustees for the purchase of the estates, articles of agreement were entered into by the said *John Iveson* and the defendants, dated the 10th of *February*, 1773, whereby the defend-

ants

ants agreed to release unto the trustees all their right and interest in the estates; and *John Iveson* deceased agreed, that he would, immediately after the estates had been conveyed to him, secure the £3,000 by mortgage of the estates unto the defendants, in equal proportions, on the 10th of *October*, 1776, with interest for the same. That after the execution of the mortgage of the 18th of *August*, 1774, *John Iveson* deceased signed another agreement, dated the 24th of that month, whereby, after reciting that the said £3,000 had not been received by the respondents, he agreed to secure to each of the defendants the sum of £1,000 with interest, by mortgage of the estates, as soon as deeds could be prepared for that purpose: and, accordingly, each of the defendants claimed the sum of £1,000 part of the said £3,000, and insisted, that notwithstanding the said *John Iveson* deceased had not executed a mortgage for securing the same, yet they were entitled to be paid the same, immediately after the said mortgage made to *Harriot Amyand*.—It did not appear in the cause that the plaintiff had any notice of this agreement with *George*, *Margaret*, and *Rosey Iveson*, although he had of their release, and the estates proving insufficient to pay all the incumbrances; the question was, whether the equitable charge arising from the agreement of *John Iveson* with the defendants, should, or should not, be preferred to the plaintiff's mortgage.

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The *Lord Chancellor*, 26th *February*, 1783, on hearing counsel for the plaintiff only, decreed the charge in favour of the younger children, to be *prior* to the securities of the plaintiff, and dismissed the bill. The plaintiff presented his petition of re-hearing from this part of the decree, to the late *Lords Commissioners*, before whom the cause was argued the 7th of *December*, 1783, but never determined by them: the great seal being restored to *Lord Thurlow* before they pronounced any decree.

It came on before his Lordship this term, and was argued by *Mr. Ambler*, *Mr. Mansfield*, *Mr. Scott*, and *Mr. Bicknel*, for the plaintiffs; *Mr. Attorney-General*, *Mr. Hollist*, *Mr. King*, and *Mr. Shuter*, for the defendants.

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For the plaintiffs it was contended—that this was only a new security for the old debt, and that the defendants had held out to the plaintiff that they were satisfied; although it was acknowledged; that if this had been a new sum of £3,000, lent to the brother upon this equitable security, the younger children should have had a priority before *Becket*, the subsequent incumbrancer; but that being for the old debt, they should not have priority, even though they had taken the legal estate, 2 *Vern.* 150. That it is a settled

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point that a person having a prior security, and knowing that another person is treating, ought to disclose his security, *Mocatta v. Murgatroyd*, 1 P. W. 393, *Peter v. Russel*, 1 Eq. Ab. 321. But here the younger children having a right to the £3,000 join in the conveyance, and, by the receipt, declare they are satisfied; and *Becket* seeing that receipt, lends that money upon confidence of it: so that they assist to draw in *Becket* to lend the money upon a security he otherwise would not have done it upon, which is a fraud upon him. They cited also *Hobbs v. Norton*, 1 Vern. 136. *Hungerford v. Earle*, 2 Vern. 261. *Ibbotson v. Rhodes*, 2 Vern. 554. *Berrisford v. Milward*, 2 Atk. 49.

For the defendants it was argued—that the only parties they had any connexion with were Miss *Amyand* and her agents; and the only consent they gave was to be postponed to her security, to which they were still ready to submit. That, among equitable securities, the only circumstance to give priority of payment is priority of time, and as *Iveson*, the legal estate being in Miss *Amyand*, could only carry an equitable security to market, whoever dealt with him must deal upon his honour. That in this case the plaintiff did not deal upon the security of the estate: the first money he lent being upon bond only. For *Rosey*, one of the defendants, it was particularly urged, that she was under age at the time of the transaction, and therefore could not be held to be bound further than by the consent in her answer put in since she was of age, which was only to be postponed to Miss *Amyand*.

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It stood over till *February* the 10th, when *Lord Chancellor* gave judgment.

Lord Chancellor.—From the nature of the case I did not expect to hear so much argument, or so many authorities cited. (His Lordship here recapitulated the circumstances). This case has been argued at large, and the authorities cited seem strong till they are looked into.—That of the *Thatched House* (*Peter v. Russel*) which seemed the grossest, upon being examined, turns out the other way; for it appears, Eq. Ab. 321; that the bill was dismissed with costs.—The other cases turn out the same. It does not appear how *Hungerford v. Earle*, 2 Vern. ended, but no fraud was there imputed. In *Ibbotson v. Rhodes*, in 2 Vern. *Rhodes* denied he had any charge on the estate, when asked by *Gargrave*; but it appears *Rhodes* had been informed that *Shipley* was in treaty to lend money upon the estate. This Court never binds a third person but when there is notice of a treaty.—As for the other cases, they are all upon the same ground. In 9 Mod. 36, the party stood by and suffered a fraudulent treaty to go on:—*Clare v. Earl of Bedford*, was a case where an infant was bound because

because he ingrossed the deed,—that was upon the principle that he knew of the transaction.—*Mocatta v. Murgatroyd*, 1 P. W. 393, the first mortgagee was a witness to the second mortgage, and was therefore postponed. I do not leave this as a case which I should determine in the same manner; for a witness, in practice, is not privy to the contents of the deed (a). The book refers to a case where Lord King denied the law to be so: the property was there bound on the principle of notice.—In *Berrisford v. Milward*, 2 Atk. 49, the party stood by whilst the estate was re-mortgaged, and had promised to take personal security. There is no case in the books, but where the party to whom the fraud is imputed, was conusant of the treaty in which the fraud was practised; but although there is no such case, yet if it appeared that the parties were confederating together to cheat some one, although the particular person was not known, the case would fall within the same principle, and must receive the same determination. Here the first £2,400 was advanced on a bond: the £1,200 was not lent on the credit of the mortgaged premises, otherwise than that the estate should be sold to discharge former incumbrances, and the £1,200. The plaintiff had not examined the title, but lent the last money to better his security as to the former. The time when the money was advanced is that at which the notice is material.—In order to postpone this charge, he insists that this was the whole debt.—It is compared to the case of a person selling an estate, and not receiving the money; and that therefore there is a lien; but it is not like that case, because the purchaser paid the money, and the children consented to its being paid to the brother: this puts an end to the lien, as to the estate in the hands of the purchaser (b). Here was no fraud in the intention of the parties, it was a provision for a probable event, as to which it would operate as a discharge of the estate. It is allowed that if it had been paid to the children, and afterwards lent by them by the brother upon this security, that it must preserve its priority; but there is no difference whether it is advanced the next moment or at another time. There is no difference whether it is the old debt or not, for the charge was gone, and the estate was only liable by virtue of the writing; for if there had been no such writing, it would only have been a simple-contract debt. Then, as being prior in time, it must be prior in equity; the mortgagee had the security he trusted to, he knew he had not the legal estate, he trusted to the honour of the borrower. This puts an end to the

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(a) This determination seems to have been generally disapproved of. Vide *Mr. Peere Williams's* and *Mr. Cox's* notes to the case; see also *Harding v. Crethorn*, 1 Esp. N. P. C. 56, and the other cases cited by *Mr. Sugden*, *Vend. & Purch.* 654.

(b) See this passage cited by Lord Eldon, in his very elaborate judgment in the case of *Mackreth v. Symmons*, 15 Ves. 346. As to the cases upon the doctrine of the vendor's lien, vide *Blackburne v. Grogan*, post, 420.

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case of the younger child, who was an infant at the time of the transaction : if there was a fraud, of which the infant was conscious, she would be bound as much as an adult (a). But I think there is no reason to attribute fraud to any of them.

His Lordship affirmed the former decree, by which the charge of £3,000 was to be considered as prior to the securities of the plaintiff (b).

From this decree the plaintiff brought an appeal in parliament, but did not prosecute it; in consequence, as the Reporter has been informed, of its being discovered that the estates were insufficient to pay the prior incumbrances.

(a) See a similar observation of Lord Mansfield, in the case of the *Earl of Buckinghamshire v. Drury*, 2 Eden, 72, and *Cory v. Gertcken*, 2 Madd. 40, where all the cases upon this point are

cited and considered.

(b) As to the cases on the subject of priorities of incumbrances, vide *Robinson v. Davison*, ante, p. 63.

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(c) NEWTON v. BENNET.

Where an executor keeps the money of his testator in his hands, without accounting for a long time, and employs it in his trade, he shall pay interest.

THIS was a branch of the cause reported before, p. 135, and now came on for further directions upon a reserved question, whether the defendant *Bennet* should be charged interest for sums belonging to the estate of *Moore* his testator, and remaining from time to time in his hands, which he used in common with his own money in the way of his trade, under the following circumstances:

Moore and *Tryon* had been partners.—The partnership was dissolved in 1743, but *Moore's* name continued in the business, and *Tryon* gave *Moore* an assignment of scheduled debts, and also a further security to indemnify him from all debts which should be incurred.—In 1747 *Tryon* died. By his will he appointed *Moore* executor.—In 1754 *Moore* died, and by his will gave several legacies to the plaintiffs, and appointed *Bennet* and one *Gibson* (not now a party) executors; *Bennet* also took out administration *de bonis non* to *Tryon*.—Soon after the death of *Moore*, *Bennet* called in several bond debts due from different persons to *Moore's* estate, and bearing interest, and being himself indebted by bond or note bearing interest, in the sum of £1,500 to *Moore*; he gave credit to *Moore's* estate for that sum, and debited the estate

(c) *Littlehales v. Gascoyne*, post, vol. iii. 73, and *Franklin v. Frith*, ibid. 433. *Young v. Combe*, 4 Ves. 101.

for

for £1,400 and upwards, as so much paid to *Tryon's* estate, being the balance due from *Moore*, as executor to the estate of *Tryon*, *Bennet's* first testator. In *Moore's* life-time, *Bisse*, a creditor of *Tryon*, had brought an action and filed a bill against *Moore*; and the suit having abated, was revived against the defendant and his co-executor, to *Moore*. Upon the hearing, the bill was ordered to be retained for six months, with liberty to the plaintiff to proceed at law, which he did, and in *Michaelmas* Term, 1759, obtained a verdict, and recovered judgment for £7,750, which *Bisse* the plaintiff afterwards, 17th of *December*, 1763, upon a representation that *Tryon* and *Moore's* estates were both insolvent, assigned to *Bennet* for £3,090.

Subsequent to this, several sums of money coming from time to time into *Bennet's* hands from *Moore's* estates, the plaintiffs filed the present bill in *December* 1768, and the cause being heard the 4th of *July*, 1771, the principal question then made was, whether *Bennet* was entitled to the advantage arising from the compromise with *Bisse*, or should be held to have made it for the benefit of *Moore's* estate, when the Court decreed that he should be allowed upon the account, only the sum he actually paid to *Bisse*; and it being referred to a Master to take an account, and make a separate report of the estate of *Moore*, come to *Bennet's* hands, Master *Hett*, 14th of *February*, 1776, made his separate report, making rests every year, and stating a final balance of £1,688. 16s. 9d. to be due, which the defendant was ordered to pay, and did accordingly pay into the Bank.

And now the question was, whether he should pay interest for the sums from time to time in his hands, and whether he should be allowed, or should pay costs.

Mr. *Madocks*, for the plaintiff, cited *Ratcliffe v. Graves*, 1 Vern. 196, that where an executor has made interest of the testator's assets, he shall pay interest.

Mr. *Scott* and Mr. *Hollist* for the defendant, said—that the same case which Mr. *Madocks* had cited for the plaintiff, was also reported in 2 Ch. Ca. 152, and appeared there to be against all the former determinations, particularly against that of *Gardner v. Cartwright*;—that it is true it is laid down in *Lee v. Lee*, 2 Vern. 548, that where an executor makes interest, he shall be charged interest; but that is against the modern adjudications. In *Bromfielf v. Witherley*, Pr. Ch. 505, the Lord Chancellor took a distinction, that where an executor was solvent he should not pay interest; but if he was insolvent and made interest, he should pay it because he ran no risk. There are many modern authorities, that an executor using the testator's money in the way of his trade, should not be charged with interest. In *Adams v. Gale*, 2 Atk. 106,
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Lord *Hardwicke* would not allow interest, because the executor might use the money. To apply the authorities to the present case:—when *Bennet* came into the double capacity of executor to *Moore*, and administrator to *Tryon*, he applied *Moore's* effects to pay the debt due to *Tryon's* estate: and a suit having been brought against *Moore* in his life-time, *Bennet* got in debts due to the estate, in order to answer the demand as far as they would go. In this he was right; for if the bond debts had continued outstanding, *Bennet* would have been answerable for them, *Shelley's case*, 1 Salk. 296.

Lord Chancellor.—*Moore* and *Tryon* had been in partnership, which ended in 1743, but *Moore's* name continued in the business, under an indemnity, till 1747, and there was an assignment of all debts to indemnify him from the consequences of his name being in the business. In 1747 *Tryon* died, and left *Moore* his executor. *Moore* died in 1754, and then his estate was indebted to *Tryon's* £1,400. There was one outstanding demand upon their partnership in *Bisse*. Upon *Moore's* death, *Bennet* took out administration to *Tryon*. *Bennet* was indebted to *Moore* in £1,500. *Moore's* estate was unengaged, except to *Bisse*. *Bennet* had, down to 1760, about £3,000 of the estate of *Moore* in his hands. He took no steps to clear *Moore's* estate: in order to do this he should have cleared *Tryon's*—there was a joint debt of *Tryon's* and *Moore's* outstanding; this *Bennet* knew, but he did not know whether *Tryon's* estate would be sufficient to pay it; if he had, then there would have been a manifest neglect in *Bennet*. If *Tyron's* estate was sufficient, *Moore's* was clear. In 1760, that case was compromised, till then it does not appear *Bennet* kept the money in his hands without a cause, there being an outstanding demand. From 1760, the question is, whether he shall pay interest, having applied the money in the course of his trade. There are many sayings in the books, to prevent its being laid down as a general rule, that an executor shall pay interest for money used in the course of his trade; but it does not follow that he may keep the estate of the testator for a long course of time idle, from the persons entitled to it by the will. The doctrine I am desired to lay down is, that an executor may keep his testator's money, and apply it to the uses of his trade, without being liable to interest. It has been argued to this extent, that if the executor is solvent he shall not pay interest; if he is not he shall. I cannot see the reason of that case. It is impossible this should have been laid down as the law of the Court. I do not say he shall pay interest on the ground of his having called in a debt which bore interest, because an executor has an honest discretion to call in money which he thinks in hazard; but when it is called in and made profit of in the way of his trade, I think he should be charged with interest. The books say he shall not, because it might be lost, and if it was he must have answered it.

This argument would apply equally to the case where the executor makes actual interest, for the party to whom it is lent may become insolvent. When the executor did not apply the money to the uses of the will, or bring it hither, I must take it that he kept it for the purpose of making advantage of it in the way of his trade.—From 1760, *Bennet* had not a colour of reason for not bringing it.—He could not be guilty of a *devastavit*, for there was no demand out. The whole ground of this defence is, that he ought to have the advantage of the compromise which was made composing on *Bisse*,—he has not shewn any reasonable cause for not bringing the money, but has done it merely for the sake of using it in trade; he therefore must be charged interest (a).—As to the costs, it is a general rule that an executor has a claim to costs, as he goes to the taking of the account, but a great part of the expense of this cause arises upon his claim to the advantage of the compromise; by this claim, and by his delay, he has caused all the expenses except the taking the first account: but it is not possible to separate the expences, I shall therefore satisfy myself with not charging him costs (b).

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For the cases where executors or administrators have been charged with interest, see *Ekins v. The East India Company*, 1 P. W. 395. *Perkins v. Baynton*, 375. *Foster v. Foster*, post, vol. ii. 516. *Forbes v. Ross*, post, vol. ii. 113. *Hall v. Hallett*, 134. *Seers v. Hind*, 1 Ves. jun. 224. *Young v. Combe*, 4 Ves. 101. *Pietry v. ib.* 620. *Pocock v. Reddington*, 794. *Long v. Stewart*, cit. ib. 794. *More v. Broom*, 7 Ves. 124. *Rockett*, 11 Ves. 58. *Raphael v. Boehm*, 13 Ves. 407. & 593. *Mosley*, 11 Ves. 581. *Dornford v. Dornford*, 12 Ves. 127. *Bruyere v. Pemberton*, ib. 386. *Ashburnham v. Thompson*, 13 Ves. 402. *Stewart v. Lord*, 2 Ridg. P. C. 204. *Dawson v. Dawson*, 1 Ba. & Be. 219. *Tebbs v. Carter*, 1 Madd. Rep. 290, by which it is fully settled, that if an executor is charged with regard to his testator's property in any other way than his trust, he cannot be a gainer by it: the loss must be for the benefit of the testator's estate, and any loss must be charged by him. As to the rate at which they are to be charged, the cases do not establish a distinction between negligence and corruption in execution. In the former case, a court will not charge them beyond 4 per cent, requiring a special case to induce a charge of more. For the

application of the above doctrine to receivers, &c. vide the *Earl of Lonsdale v. Church*, Rolls, 17th Dec. 1789, cited by the Editor of the 3d edition of this work, where the receiver of the duties in the harbour of *Whitehaven*, having a yearly salary, was decreed to pay interest upon balances from time to time in his hands and laid out by him on securities, *Fletcher v. Dodd*, 1 Ves. jun. 83. — *v. Jolland*, 8 Ves. 72. *Potts v. Leighton*, 15 Ves. 273. *Ex parte Townshend*, ib. 470. *Dawson v. Massey*, cit. ante, as to assignees before the statute 49 Geo. 3, c. 121. *Treves v. Townshend*, post, 384. S. C. 1 Cox, 50. In re *Hilliard*, 1 Ves. jun. 90. *Hankey v. Garratt*, ib. 457.

(b) In *Seers v. Hind*, 1 Ves. jun. 224, Lord *Thurlow* is reported to have said, that when obliged to give interests against an executor as a remedy for a breach of trust, costs must follow of course. In *Ashburnham v. Thompson*, 13 Ves. 402, however, Sir *W. Grant* departed from this rule, and went into the circumstances of the case as a ground for costs. In *Hall v. Hallett*, 1 Cox, 141, Lord *Thurlow* said, that an executor was allowed his costs even where great delays and difficulties had been occasioned by him; but in that case, there having been gross breaches of trust, the executors were directed to

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to pay all the costs, except those of taking the account of the estate. In *Raphael v. Boehm*, 13 Ves. 590, the executor was allowed subsequent costs, and not charged with costs as to the inquiries and accounts relating to the breach of trust; so also *Piety v. Stace*, 4 Ves. 620. *Pocock v. Reddington*, 5 Ves. 794. *Rocke v. Hart*, 11 Ves. 58. *Mosley v. Ward*, ib. 581, in which the executors were charged with costs, were all cases of gross breach of trust. In *Tebbs v. Carpenter*, 1 Madd. Rep.

307, Sir T. Plumer drew as a conclusion from the above cases, that it does not follow that in all cases where an executor is directed to pay interest he must also pay costs: that if a suit would have been proper, and the executor a necessary party, he ought not to pay *all* the costs of the suit, though in the course of it he appears to have misconducted himself: but if his misconduct was the *sole* occasion of the suit, he ought then to pay the costs,

EASTER TERM.

24 GEO. III. 1784.

EDWARD Lord THURLOW, Lord High Chancellor.

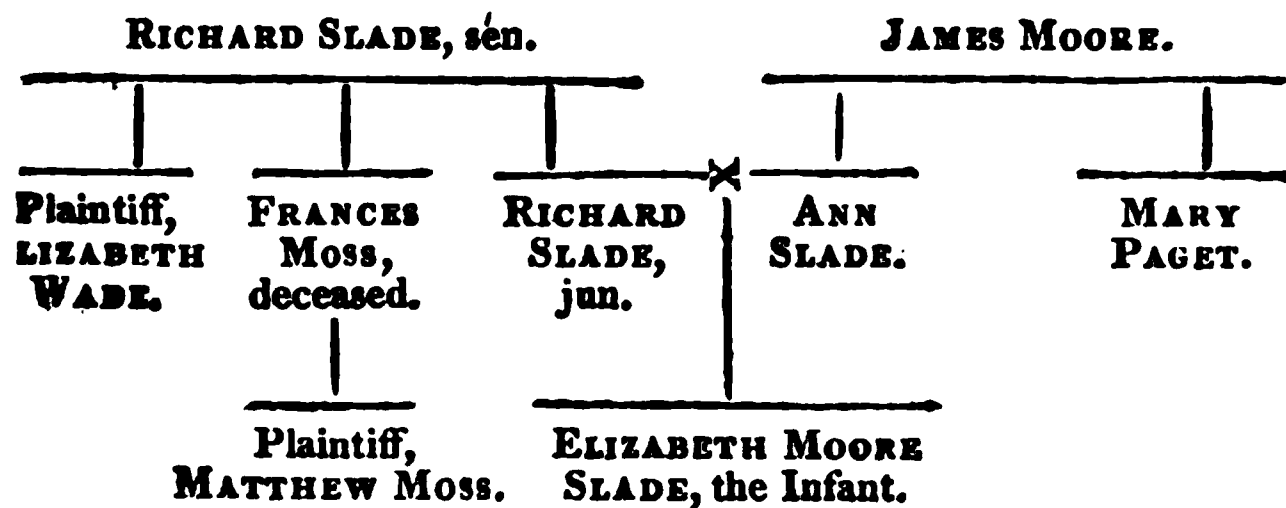
LLOYD KENYON, Bart. Master of the Rolls.

RICHARD PEPPER ARDEN, Esq. Attorney-General.

ARCHIBALD MACDONALD, Esq. Solicitor-General.

LTHORPE WADE, Clerk, since deceased, and ELIZABETH his Widow, him surviving; which said ELIZABETH is the Sister of RICHARD SLADE the younger, Esq. who was the Father of ELIZABETH MOORE SLADE, by ANN his late Wife, both deceased; and which said ANN SLADE was one of the Daughters of JAMES MOORE, Esq. deceased; and MATTHEW MOSS, an Infant, by RICHARD SLADE, Esq. his next Friend; which said MATTHEW MOSS is the eldest Son, and Heir at Law of JOHN MOSS, Esq. by FRANCES his Wife, deceased, and which said FRANCES was another of the Sisters of the said RICHARD SLADE the younger; and which said ELIZABETH and MATTHEW MOSS are the Co-heirs at Law of the said ELIZABETH MOORE SLADE, the Daughter and Heir at Law of said RICHARD SLADE the younger and ANN his Wife, Plaintiffs.

RICHARD PAGET, and MARY his Wife, RICHARD SAVAGE, and ROBERT BATH, - - - Defendants.



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1 Cox, 74.

ROBERT HILL, seised in fee of lands in *Pilton*, and in tail of an estate in *West Pennard*, in *Somersetshire*, by lease and release, dated the 17th and 18th October, 1745, the release

Where legal and equitable estates meet in the same person,—the equitable merge

in the legal.—A certain estate is covenanted to be conveyed, and is not so, the breach of the covenant is in damages.—Such damages are money, not land in the hands of the party injured. Where a power is reserved to be executed by deed, in the presence of three witnesses.—It is by marriage settlement executed, but the deed is attended by only two, this shall be supplied.

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being of three parts, and made between the said *Robert Hill* of the first part; *Solomon Hughes* of the second part; and *James Moore* of the third part; the said *Robert Hill* conveyed to the said *Solomon Hughes* and his heirs (amongst other things) the said messuage and lands situate at *West Pennard*, for the purpose of making the said *Solomon Hughes* a tenant to the *præcipe* for suffering a common recovery thereof; the uses of which recovery were declared to be to the use of the said *Robert Hill* for life, without impeachment of waste, with remainder to the said *James Moore* in like manner, with remainder to such child or children of the body of the said *James Moore* by *Christian* his late wife, (who was sister to the said *Robert Hill*) for such estate and estates, term or terms, and interest, and in such shares, parts, and proportions, and chargeable with such sum or sums of money in gross or otherwise,—and in such manner as the said *James Moore* should, by any deed or deeds, will in writing, or other writing or writings, duly signed and executed in the presence of three or more credible witnesses, direct, nominate, will, or appoint; and in default therefore, to the use of all and every the child or children of the said *James Moore*, by the said *Christian* his wife, that should be living at the death of the survivor of them, the said *Robert Hill* and *James Moore*, and the heirs of the body or bodies of such children as should be then dead, equally between them as tenants in common:—And a common recovery was suffered accordingly:—Upon the death of the said *Robert Hill*, the lands in *Pilton* descended to the defendant *Mary Paget*, *Ann Moore*, hereinafter mentioned, and their sister *Elizabeth*, as his nieces and heiresses at law, which *Elizabeth* died before the settlement of 1765, presently to be mentioned, and the defendant *Mary*, and *Ann Moore* were her co-heiresses.

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In November 1765, a treaty of marriage being on foot between *Robert Slade* the younger and *Ann*, afterwards his wife, and the said *James Moore* being really entitled only as above stated (but whether his title was known to the *Slades* does not appear), proposed to *Slade* the elder and *Slade* the younger, that if they would settle certain freehold lands and premises upon said marriage, the said *James Moore* would likewise settle the said premises of which he was seised, in manner hereinafter mentioned: and the said *Slade* the elder and *Slade* the younger having agreed thereto, by lease and release, dated respectively, the 6th and 7th of November, 1765, the release of four parts, and made between the said *Slade* the elder of the first part, *Slade* the younger of the second part, *James Moore* and *Ann* his daughter of the third part, and *William Savage* and *Robert Bath* of the fourth part:—After reciting, among other things, that a marriage was then intended to be solemnized between the said *Slade* the younger and *Ann Moore*, and also reciting that the said *James Moore* stood seised in fee of the freehold messuages,

suages, lands, tenements, and hereditaments thereafter described, situate in the parishes of *West Pennard* and *Pilton*, and was also possessed of several leasehold lands and premises in *West Pennard*; and also reciting that it was agreed between the said *Slade* the elder, *Slade* the younger, and *James Moore*, and *Ann Moore*, that the said freehold and leasehold lands and premises of the said *James Moore*, with the freehold and leasehold estates of *Slade* the elder and *Slade* the younger should be conveyed to trustees, upon the trusts and to the uses therein and hereinafter expressed :—The said *Slade* the elder and *Slade* the younger did convey the said freehold and leasehold estates accordingly, and the said *James Moore*, in consideration of the then intended marriage, and in pursuance of the said agreement on his part, and of 5s. paid by the said trustees, did, amongst other things, grant, &c. and confirm to the said trustees and their heirs and assigns, a messuage and lands in *West Pennard* aforesaid, and also divers lands at *Pilton* aforesaid, to hold the said estates released as well by the said *Slade* the younger, and by the said *James Moore*, unto the said trustees, to the use of each granting party, *his heirs and assigns, until the marriage*, and after the same, to the use of *Slade the younger for life, remainder to the same trustees to preserve contingent estates—remainder to Ann Moore for life,—remainder to the issue of the marriage, for such estates and in such manner as Slade the younger and Ann during their joint lives should appoint, and for want of such appointment to the use of the first or only son of Slade the younger on the body of the said Ann to be begotten, in fee, and in default of such issue, then to the use of the daughters of the said Slade the younger, on the body of the said Ann to be begotten, and of the heirs of their respective bodies, as tenants in common : and in case there should happen to be but one such daughter of said intended marriage, to the use of such only child in fee, and in default of such issue to the respective granting parties in fee, with covenants for quiet enjoyment and further assurances.—This deed was executed in the presence of two witnesses only. The marriage between the said *Slade* the younger and *Ann Moore* took place, and *Slade* the younger entered into possession of all the premises so conveyed by the said *James Moore*, and continued in possession and receipt of the rents and profits thereof to his death. *Ann Slade* died in *May 1767*,—leaving the said *Slade* the younger, and *Elizabeth Moore Slade*, her daughter and only child, and heir at law, by the said *Slade* the younger, her surviving. About *August 1768*, *Elizabeth Moore Slade* the daughter, died an infant and without issue, and in *October 1774*, *Slade* the younger her father, died without issue. .*

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The plaintiffs filed this bill, insisting that the marriage settlement of the 6th and 7th of *November, 1765*, was a good execution of the power given to *James Moore*, by the deeds of the 17th and 18th of *October, 1745*, or that, if it was a defective execution, it

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it ought to be supplied by the Court, being in consideration of marriage, or if the Court should be of opinion that the defect could not be supplied, that they were entitled to a satisfaction out of the assets of *James Moore*, come to the hands of the defendant *Mary Paget*, as his representative. The defendants in their answer, insisted that no appointment having been made by *James Moore*, the estate in *West Pennard* became on the death of *James Moore*, vested in possession in defendant *Mary*, either under the indentures of the 17th and 18th of *October*, 1745, as his only surviving child and heir at law, or as the heir at law *ex parte materna*, of *Elizabeth Moore Slade*; and that the moiety of the lands in *Pilton*, which *Ann Slade* was seised of at the time of her marriage, descended upon her daughter *Elizabeth Moore Slade*, (subject to *Slade* the younger's estate by the courtesy) and upon her death, descended upon the defendant *Mary* as her heir upon the part of the mother, (subject to the said estate by the courtesy): and that on the death of *Slade* the younger, the defendant *Mary* became entitled to the possession of that moiety, *James Moore* having had no title in him to the lands in *Pilton*: and they endeavoured, by circumstances, to affect the *Slades* with notice of the imperfect title of *Moore* in the *West Pennard* lands, and of his having no title to those in *Pilton*, but without making out that circumstance in evidence.

It was argued by Mr. *Munsfield* and Mr. *Selwyn* for the plaintiffs, Mr. *Madocks*, Mr. *Morris*, Mr. *Scott*, and Mr. *Hollist* for the defendants.

For the plaintiffs it was contended,—that although the deed of appointment, being executed in the presence of two witnesses only, might not be an execution of the power, yet as *Moore* had a power to appoint, the Court would supply the defect; and to this purpose were cited *Coventry v. Coventry*, 1 Str. 596. 604. 1 Ch. Ca. 263. 2 P. W. 489. *Cotter v. Layer*, 2 P. W. 623, and *Godwin v. Fisker (a)*, before Lord *Camden* in 1769, in which he spoke with great approbation of *Cotter v. Layer*.—But that, if this could not be supplied, they were at least entitled to a satisfaction out of *Moore's* assets.—Secondly, as to *Pilton*, *Moore* had agreed it should be settled; *Ann Moore* was a party to that deed, and concurred in the recital of his title—that will bind her moiety: and as to the other moiety, satisfaction must be made out of *Moore's* assets.

Upon the first question, it was argued for the defendants, that if the deed of 1765 was an execution of the power, the parties

(a) This case, as observed by Mr. *Sugden*, Pow. 360, n. must be the same

case as *Godwin v. Kilsha*, Amb. 684. Reg. Lib. A. 1768, fol. 495.

need not come here, but might recover at law: if it was not, it ought not to be supplied, because the person who claims is not an object of the settlement, which was only to provide for the husband and wife, and but partially for the issue.—They cited *Goodright*, dem. *Alston v. Wells*, Doug. 741. (a)—where Lord Mansfield was of opinion a court of equity would not interfere between the heir *ex parte paternâ* and the heir *ex parte maternâ*.

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The Lord Chancellor said (b), that during the twelve-month the infant survived her mother, she had the legal estate in fee in one moiety, as well as the equitable estate in fee by the covenant; and that it is universally true, that where the estates unite, the equitable must merge in the legal: that the estate was executed without any act done, therefore that moiety had descended to the defendant Mrs. Paget (c). With respect to the other moiety it was perfectly different.—*Moore* has contracted to convey it, and there is a breach of the contract which sounds in damages, and therefore there must be an issue directed to try what the damages are. This is a contract to settle a particular estate, not to purchase lands.—If it were, I should decree lands to be purchased and settled; but being to settle a particular estate, it is only in damages.—With regard to the *West Pennard* lands, I am perfectly clear, from all the cases, that I must consider this as a case fit and proper to be supplied by this Court (d).

A question arose as to the sum to be taken as damages, whether it should be real or personal property; but the Lord Chancellor said that the money must be in the same situation as if it had been recovered by the daughter in her life-time.—In that case, if there had been contingent uses outstanding, the Court would have decreed the money to be laid out in land, subject to the contingencies; but in this case, as she would have been entitled to the estate in fee-simple, the Court would have given it absolutely to her: and the father having survived the child, by which he became entitled as her representative, it must be paid to the plaintiff *Elizabeth*, as next of kin to him.—By consent, it was referred to the Master to settle the amount of the damages, instead of going to an issue.

A power to be executed by writing in the presence of three witnesses, it is executed in consideration of marriage, in the presence of two witnesses only. This defective execution shall be supplied.

(a) 2d edit. p. 771.

(b) The Lord Chancellor's judgment is more fully given, 1 Cox, 74.

(c) This opinion of Lord Thurlow, was approved of and relied upon by Lord Alvanley, in *Philips v. Brydges*, 3 Ves. 126. and *Selby v. Alston*, ib. 339. by which and by the case above cited from Douglas, it is clearly settled, that if a man have an equitable estate in him, *ex parte paternâ* or *ex parte maternâ*, and afterwards by descent

or otherwise acquire the legal estate, the equitable estate will merge in the legal, and the descent will be according to his title to the legal estate, whether that be *ex parte paternâ* or *ex parte maternâ*.

(d) See this case cited in a note to *Shannon v. Bradstreet*, 1 Sch. & Lef. 60. n. also *Wilkie v. Holmes*, cit. ib. 1 Dick. 165. 9 Mod. 485. also Sugd. on Pow. 360.

LOWE

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LOWE v. MORGAN.

Mortgage
Parties.

A SHARE of *Covent Garden Playhouse* having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Register, finding some difficulty in drawing up the decree, applied to the *Lord Chancellor*, who said it was a new case, in respect of their being joint tenants, and that it would be impossible for one to foreclose without making the other two parties. The cause therefore stood over for that purpose (a).

(a) Vide *Fell v. Brown*, post, vol. ii. 276, and the Editor's note.

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S. C.

20 *Serj. Hill's MSS.* 200. very fully reported.

Lincoln's-Inn Hall, March 4th and 5th, 1784. In Court, 10th of May, 1784. Mr. Justice Gould in absence of Lord Thurlow.

Son tenant in tail of an estate, upon the death of the mother (who was tenant for life) makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life; although the father derives some benefit under the settlement, it shall not be set aside, as entered into under undue influence.

KINCHANT v. KINCHANT.

THIS bill was brought by the plaintiff, *John Charlton Kinchant*, against *John Kinchant*, plaintiff's father, and *Francis Kinchant*, *Richard Kinchant*, *Emma Gardiner*, and *Elizabeth Brooke*, plaintiff's brothers and sisters, to set aside certain deeds executed by the plaintiff upon his coming of age, as being obtained from him by undue influence and authority of the father. The plaintiff's father, who did not appear to have had any fortune of his own, married the plaintiff's mother, who was entitled, under the marriage-settlement of her father *Sir Francis Charlton*, and was then in possession of an estate called *Park Hall*, of the yearly value of £500, as tenant for life, with remainder to plaintiff in tail; and she was also tenant in tail, in possession, of an estate called *Bishop's Castle*, of the yearly value of £350.—In the year 1767, during the coverture, the plaintiff's father and mother suffered a recovery of the *Bishop's Castle* estate, and limited the uses of it to the plaintiff's father for life,—remainder to trustees, to preserve, &c. remainder to the mother for life,—remainder to plaintiff for life, remainder to his (plaintiff's) first and other sons in tail-male: remainder to defendant *Francis Kinchant* for life, and his first and other sons in tail-male, with like remainders to defendant *Richard Kinchant*, and his first and other sons; with remainder to all the other sons of plaintiff's father and mother, and their first and other sons in tail-male; remainder to defendants, *Emma* and *Elizabeth*, as tenants in tail general; remainder to plaintiff's mother in fee,—with power reserved to the plaintiff's father and mother jointly, to raise, by way of charge upon the estate, the sum of £3,000, for such purposes as they should think fit,—and also for

for the sons, when in possession, to charge the estate with jointures of £200 *per annum*; and to charge it with £3,000 for younger childrens portions.—Plaintiff's mother died 11th, and was buried 18th *January*, 1772, leaving the plaintiff, her eldest son, who thereupon became entitled, as tenant in tail in possession, to the *Park Hall* estate.—The plaintiff had attained his age of twenty-one years, in the year 1770, and thereupon he had joined with his father and mother in selling some part of the *Park Hall* estate, which raised a sum of £5,000, and which was intended to be applied in paying off the incumbrances, which affected the estates generally, and in repairs. And £3,000 part thereof, was applied in paying off mortgages which had been made of the *Park Hall* estate before the marriage; £1,200 other part thereof, was paid in discharge of a mortgage of the *Bishop's Castle* estate, which £1,200 had been raised to purchase a commission in the army for the plaintiff: and the remaining £800 was applied in different expences attending the sale, and in repairs; but which were not specified by the defendant's answer.—On the 19th *January*, 1772 (the day after the mother's funeral) a memorandum was drawn up by a Mr. *Ashby* (since dead) who was an attorney intimate in the family, in the following words:—"Instructions from *John Charlton Kinchant*, Esq. taken at *Park*, 19th *January*, 1772.—He is entitled as tenant in tail, in possession, on the decease of his mother, lately deceased, to the *Park* estate near *Oswestry*, of the yearly value of £500. About £60 a year consists in houses, buildings, and gardens and yards in the town and liberties of *Oswestry*.—He will be entitled, on the death of his father, to an estate in and near *Bishop's Castle*, about £360 a year for his life, with remainder to his first and other sons in tail, with power to make a jointure and fortune for younger children.—Mr. *Charlton Kinchant* owes his father about £270, and it will take some hundreds of pounds more to complete the repairs of the tenements and buildings on the *Park* estate.—The houses, buildings, gardens, and yards in *Oswestry* are most fit to be sold, to answer the purpose of paying this money, and of repairing the *Park* estate, and of paying the young gentleman's debts, and of answering two occasions. He proposes to give each of his two sisters £1,000 a piece, upon their attaining their respective ages of twenty-one years, with interest from that time at 4 *per cent*.—He proposes and agrees that his father shall have the rents and profits of the *Park* estate, becoming due at *Lady-day* next, from which time the son is to have the growing rents; and the father to release to him all demands and claims which he has on that estate; the son then taking upon him all repairs agreed by the father to be done on the *Park* estate—the father to be repaid, out of the money the commission produces, all debts he has paid for his son, being £54 to Mr. *Ashby*, £20 to Mr. *Robinson*, and about £13 for lodging.—He proposes to suffer
"a recovery

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“ a recovery of the *Park* estate, and to limit the premises in O-
 “ *westry* to such uses as he shall by deed or deeds direct or ap-
 “ point; and in default of such appointment, and of such parts
 “ whereof no appointment shall be made, as also of all other parts
 “ of the *Park* estate, to the use of himself for life, without im-
 “ peachment of waste, with remainder to his first and other sons
 “ in tail; with remainder to his father for life, with remainder to
 “ his brother *Francis* for life, and to his first and other sons in tail;
 “ with remainder to his brother *Richard* for life, and to his first
 “ and other sons in tail; with remainder to his sisters *Emma* and
 “ *Elizabeth* as tenants in common, and to their heirs, with re-
 “ mainder to himself in fee.—Power for making a jointure, by
 “ way of annuity, on any wife he marries, not exceeding £200,
 “ chargeable on the *Park* estate.—Power for him to charge *Park*
 “ estate with any sum not exceeding £2,000 for younger children,
 “ with benefit of survivorship, and if only one younger child
 “ with the whole £2,000.—Power for his brothers respectively
 “ to charge the *Park Hall* estate with £1,000 for their younger
 “ children, after they respectively come into possession.—Usual
 “ powers for making leases.—Power for brothers *Francis* and
 “ *Richard* respectively, when in possession, to grant a jointure,
 “ by way of annuity, or £100 a year to any wife.—There is an
 “ annuity of £9 a year charged on that part of the estate which
 “ was lately sold to *John Mytton*, Esq. for the life of Mr. *Studley*,
 “ late of *Ellesmere*, a very old man, about 80 years old, payable
 “ to Mr. *Burlin*, and which annuity the son agrees to pay from
 “ *Lady-day* next, and to indemnify the father from the payment
 “ of the said annuity.”—On which memorandum the plaintiff en-
 “ dorsed as follows:—“ I agree with the foregoing proposal, and
 “ agree hereto, and engage to carry the same into execution, and
 “ request Mr. *Ashby* to prepare deeds accordingly, and to suffer
 “ the recovery, to enable me to complete the same. Witness my
 “ hand the 19th of *January*, 1772.—J. C. *Kinchant*.”—*Ashby*
 prepared indentures of lease and release, which were made to bear
 date the 18th and 19th of *January*, 1772, although the same were
 not executed until the first or second of *February* following; and
 thereby the *Park Hall* estate was limited to trustees for a term of
 five hundred years, for raising the £2,000 for the plaintiff's sisters
Emma and *Elizabeth*, and then to the plaintiff for life; remainder
 to trustees to preserve, &c. remainder to the first and other sons of
 the plaintiff, in tail general; remainder to the father for life, with-
 out impeachment of waste; remainder to *Francis* for life, and his
 first and other sons in tail general; remainder to *Richard* and his
 first and other sons in like manner; remainder to all and every the
 daughter and daughters of the plaintiff as tenants in common in tail
 general; remainder to *Emma* and *Elizabeth* as tenants in common
 in tail general; remainder to the daughters of *Francis Kinchant*
 in tail, in like manner; remainder to the daughters of *Richard* in
 like

like manner; remainder to *Gertrude Brown*, daughter of plaintiff's mother by a former husband, in tail general; remainder to plaintiff in fee, with such powers as mentioned in the memorandum. The plaintiff by the bill charged that these deeds were obtained from him by the improper influence of the father, and by taking advantage of his inexperience, and particularly that the proposal was first made to him the same day the memorandum was signed, the day after his mother's funeral, and at a time when he was under great affliction, and was easily imposed upon, and that he understood what he then signed was merely to make a provision for his two sisters of £1,000 a-piece, and that, subject to that charge, he was to have the absolute disposal of the estate. And the bill prayed that the deeds so executed by him (save as to the term of five hundred years, which the plaintiff was willing should remain,) might be set aside, and that the father might be charged with the £5,000 received by him on the sale of part of the *Park* estate as aforesaid, and might discharge himself by shewing in what manner he had applied the same to the purposes for which it was raised.—The plaintiff examined no witnesses.—The defendant's case was, that the plaintiff had led a very dissolute and extravagant life, and that the defendant had been two or three times obliged to pay his debts, which facts were proved by letters written from time to time from the plaintiff to the defendant, and the defendant's late wife. The answer then stated, that by reason of the plaintiff's extravagance, it being necessary to sell his commission and quit the army, it was thereupon agreed between the plaintiff and defendant and defendant's wife (who was then alive,) that part of the *Park* estate should be sold to pay the plaintiff's debts, and the residue applied in repairs and improvements, and that the remainder of the said estate should be charged with an annuity of £200 to the plaintiff during his mother's life, and that, if the defendant should survive his said wife, the plaintiff should allow the defendant the like sum of £200 *per annum* during his (defendant's) life to be charged on the said *Park* estate, and that the said estate should be thereupon settled upon the defendant's said late wife for life, charged with such annuity to the defendant, remainder to plaintiff's first and other sons in tail-male; remainder over to his brothers and sisters in strict settlement; and that instructions were given by the plaintiff and defendant, and defendant's wife to Mr. *Ashby*, to prepare proper deeds for suffering a recovery of the said estate to the said uses.—That while the defendant was in town, in order to sell the plaintiff's commission, and pay off his debts, the defendant's wife died. That the defendant sent for Mr. *Ashby*, by the plaintiff's own desire, who took the instructions mentioned in the memorandum aforesaid, from the plaintiff's own mouth, which were read over to the plaintiff, and which he seemed to understand and approve of thoroughly, and therefore denies the circumstances of surprise and inexperience; as this transaction originated in the

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mother's life-time, and the plaintiff was fully aware of the effect of it. And for the purpose of proving the agreement in the mother's life-time, the defendant examined *Thomas Morgan*, who was executor of *Mr. Ashby*, who deposed, that after *Mr. Ashby's* death, he found a draft of an answer, appearing to be put in by *Mr. Ashby* as a defendant in this cause;—And that, from such draft, the several circumstances of the defendant's case (which he mentions particularly) appear, and the deponent verily believes them to be true.

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The case had been argued, during Lord *Thurlow's* illness, in *Lincoln's-Inn Hall*, before Mr. Justice *Gould*; and this day (10th of *May*, 1784) he came into Court and gave judgment.—Having stated the leading circumstances of the case, he went on to the following effect:—In a case of this kind, which tends to destroy the peace of families, I cannot be too careful how I proceed. The bill seeks to rescind the transaction, as proceeding from parental influence; the question is between the parties themselves, not between the creditors of either party. If the settlement was evidently unreasonable, I think it would afford evidence of improper conduct, and be a fraud apparent on the face of the deed: but, in this case, it being for the benefit of the estate, the Court ought not readily to rescind the transaction. In *Doe dem. Watson v. Routledge*, Cowp. 705, wherein *Newstead v. Searles*, 1. Atk. 265, is referred to, a voluntary deed was supported against a purchaser for a valuable consideration: the present case has nothing to do with a purchaser, but is a very strong case of a voluntary settlement, by an elder brother, for the benefit of the family. Who would not applaud the advice to make such a settlement, if coming from a friend, to prevent the young man from ruining himself and his family? Still more it must be applauded, coming from a father. In Cro. Eliz. 770, *Glanville* argued, that a father had an interest in all his children: he has a power of restraint and correction; then the question is, whether in this case there has been any abuse of that power. In the beginning, he consulted the son's wish as to his profession; the only use he made of his power was to purchase the commission, and he allowed him an additional £50 a year; so that, compared with the value of the estate, he had too large an allowance: after that, he paid the son's debts, and the son hinting an intention to sell his expectation, induced the former settlement, which gave him an annuity of £200 *per annum*, and only gave the father an estate for life, to which he was already entitled by courtesy.—By the death of the mother, the son became tenant in tail in possession, of the *Park Hall* estate; then the settlement in question was entered into. No harsh language was used on the part of the father, and as it appears that the plaintiff had an affectionate regard for his sisters, there is no reason to suppose he had not the same for the brothers. It was therefore only advice
from

from the father to a son who was independent of him. Suppose the father had exercised some paternal authority, it would not have been sufficient to set the transaction aside. *Cory v. Cory*, 1 Ves. 19. *Blunden v. Barker*, 1 P. W. 639. If the father had exercised his authority in this case, it would seem to have been very happily applied. There is no reason to suppose he abused his power. Then there is no ground to set the deed aside.—2d. Then the second question is as to the account of the £2,000 raised by the mortgage: it falls under two heads; 1st, the £1,200 paid for the commission.—As to this it is a most unfavourable application, it was a use of the power for the son's benefit, and it would be unreasonable it should be paid out of the *Bishop's Castle* estate, which, upon the mother's death, was to be the only estate to support the family; therefore the money was properly applied to pay that incumbrance.—2d. As to the remaining sum of £800 the answer of the father, which has been read in evidence, says, it was laid out in the payment of some debts, reimbursing himself sums paid, and in improving the estate: my mind revolts against there being a strict account taken of this sum.

As to this last point the cause stood over, in order to write to the plaintiff, who was abroad, and recommend a compromise upon the defendant's paying him £200; which was proposed by Mr. Justice Gould, and assented to by the father.

The son rejecting this compromise, Mr. Justice Gould was of opinion there was not sufficient ground for the Court to interfere, and dismissed the bill without costs; which order was inrolled, and upon an application, by the plaintiff, to discharge the inrolment, the Court did not incline so to do: but at length, to avoid an appeal, the parties came to a compromise (a).

(a) In family agreements, the Court has administered an equity which is not usually applied to agreements, even where some degree of authority has been exercised by a parent, or where the party might have been under a misapprehension of his rights. *Cory v. Cory*, cit. sup. *Stapilton v. Stapilton*, 1 Atk. 2. *Cann v. Cann*, 1 P. W. 723. *Bullen v. Roudy*, 2 Atk. 587. *Wycharley v. Wycharley*, 2 Eden, 175. *Stackley v. Stackley*, 1 Vea. & Bea. 23. *Dunnage v.*

White, 1 Swans. Chan. Rep. 137. As to the undue exercise of parental authority, vide *Blackborne v. Edgley*, 1 P. W. 600. *Blunden v. Barker*, ib. 634. *Morris v. Burdoughs*, 1 Atk. 498. *Cocking v. Pratt*, 1 Ves. 401. *Tendril v. Smith*, 2 Atk. 85. *Heron v. Heron*, ib. 160. *Young v. Peachy*, ib. 254. *Glissen v. Ogden*, cit. ib. *Carpenter v. Heriot*, 1 Eden, 838. *Hawkes v. Wyatt*, post, vol. iii. 156.

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PERKINS v. BAYNTON.

Administrator
ordered to pay
interest for
money in his
hands, of which
he made interest.

UPON further directions the question was, whether the defendant should pay any, and what, interest for a sum of £868, which he had received as administrator to his brother, and kept for five years in his hands. It had been referred to the Master to enquire whether he had made interest, who reported that he had mixed it with his own money, and, from time to time, had laid out the mixed fund in government securities, and had therefore made some interest, although the Master could not report what in particular. The cases cited were *Ex parte Ellington*, in the matter of *Tidswell*, 21st March, 1783, before the Lords Commissioners; *Newton v. Bennet*, ante, p. 359; and *Treves v. Townshend*, (post, p. 384.) to shew that executors and assignees had been so charged.

Lord Chancellor ordered that interest should be paid upon the £868 from 1778, when it came into *Baynton's* hands, to March, 1783, when it was paid into Court; and that such interest should be at the rate of four per cent (a).

(a) For the cases on this subject, vide *Newton v. Bennet*, ante, 356, and the Editor's note to it.

DOVE v. DOVE (a).

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Writ of assistance.

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APPLICATION having been made, in behalf of a purchaser, for an order on the tenant in possession (who was a party in the cause) to deliver possession to the purchaser; (the common order having been obtained) the party having been served with a writ of execution of the order, and an attachment for non-obedience to it, and the tenant still refusing to deliver possession, the purchaser moved sometime since for an injunction. That writ having been personally served: upon affidavit of that fact, and of disobedience to it, Mr. King moved this day for a writ of assistance, which was granted.

(a) There is the same note (*verbatim*) of this case, 1 Cox, 101; the present application, and the previous proceed-

ings, together with a great variety of precedents, are stated at large, 2 Dick. 617.

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MR. *Attorney* moved for a writ of *Ne exeat regno*.—The case appeared to be, that the contract was made in *Carolina*, that a bond was given, and was afterwards satisfied by a payment in paper money, at the value which it then legally bore in that state. The state of *Carolina* afterwards passed an ordinance, which made paper of *that kind* not a legal tender in transactions *not complete*. The parties being now here, the plaintiff applied for this writ, contending that he had an equity here from the nature of the payment there. *Lord Chancellor* refused the writ, as no equity could arise here from a transaction *legally* satisfied in the country where it arose; he said a writ of *Ne exeat* never could be granted but upon a *clear* demand.—If they had any legal claim, they might hold the defendant to bail (a).

(a) For the doctrine upon this subject, vide *Atkinson v. Leonard*, post, vol. iii. 218.

Countess Dowager of HOLDERNESSE, - - Plaintiff. [577]

Marquess of CARMARTHEN; JOHN BYRON, Esq.
and Baroness CONYERS his Wife, since deceased;
the Earl of DANBY, Lord FRANCIS GODOLPHIN
OSBORN, Lady M. H. OSBORN, (the Infant
Children of the Marquess of CARMARTHEN, by
said Baroness CONYERS, heretofore his Wife),
and A. M. BYRON (the Infant Daughter of the
said JOHN BYRON, and Baroness CONYERS),
and ELBOROUGH WOODCOCK, - - - } Defendants.

Lincoln's-Inn
Hall, 25th May.

THE prayer of this bill was, that *Elborough Woodcock* (a trustee in Lord *Holdernes*'s will named) might be decreed to raise the sum of £8,000 by sale or mortgage of a competent part of the after-mentioned annuity of £2,000 to or for the use of the plaintiff, and in case any of the defendants, who claimed or derived any beneficial interest under or by virtue of the will of the late Lord *Holdernes*, should insist that the testator had no right or title to devise or dispose of the said post-office annuity, or to make any charge thereon by his said will, and the Court should be of opinion that the said testator had not any such right of disposition; that then such defendants might make their election, whether they will confirm

An annuity of £4,000, charged upon the post office (until a sum of £100,000 should be paid, in order to be laid out in land) continues to be a mere personal annuity, and as such, to pass by grant or transfer.

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firm such the disposition and direction made and given by the said testator's will concerning the said post-office annuity, and the charge so made thereon, or whether they will relinquish and abandon all their several claims and interests in and to all the real and personal estate of the said testator under or by virtue of his said will, and if they should elect to relinquish such their claims and interest under the said will, that the same, or a sufficient part thereof, might be applied under the direction of the Court, in or for the purpose of raising and paying to the plaintiff the said sum of £8,000 so due, or in trust for her as aforesaid.

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By an act of parliament, 2 Geo. 1. reciting that King *William* and Queen *Mary*, in consideration of the services of *Frederic*, then Duke of *Schomberg*, determined to bestow on him £100,000 out of the *Exchequer*, to be laid out in lands of inheritance, to be settled to trustees and their heirs, so that the profits thereof might be enjoyed by the said *Frederic*, Duke of *Schomberg*, during his life, and after his death by *Charles*, one of his sons, afterwards Duke of *Schomberg*, and the heirs male of the body of the said *Charles*; and for default of such issue, then by *Maynhart*, afterwards Duke of *Schomberg* and *Leinster*, another son of the said Duke *Frederic*, and the heirs male of his body; and in default of such issue, then by the heirs of the body of the said Duke *Frederic*; and in default of such issue, then by the right heirs of the said Duke *Frederic* for ever. And that King *William* and Queen *Mary* had, by letters patent, granted unto the said *Maynhart*, Duke of *Schomberg*, the yearly sum of £4,000, payable to him or the heirs male of his body, by quarterly payments, out of the revenue of the post office, being for the interest of the principal sum of £100,000, until the same should be paid; and thereby declared that when the state of affairs would permit the said principal sum to be paid, the same should be laid out in the purchase of lands, and settled in trust, so that the profits thereof might be enjoyed by the said *Maynhart*, Duke of *Schomberg*, and the heirs male of his body; and in default of such issue, then by the heirs male of the body of the said Duke *Frederic* for ever. It was enacted that it should be lawful for His Majesty to grant unto the said *Maynhart*, Duke of *Schomberg* and *Leinster*, and the heirs male of his body; and for default of such issue, to the right heirs of the said *Maynhart*, Duke of *Schomberg* and *Leinster*, until the said sum of £100,000 should be paid, an annuity of £4,000, to be issuing and payable out of the revenue of the general post office. Letters patent of the said grant were accordingly passed 29th June, 2 Geo. 1. containing the like limitations, and this proviso, that so soon as the said principal sum of £100,000, or any part thereof, should be paid off, the whole interest for the same, or such part thereof as should be proportional for a sum paid off, should sink and be abated.—By indenture of bargain and sale and assignment,
 11th July,

11th July, 1719, made between *Robert*, then Earl of *Holderness*; and *Frederica*, then Countess of *Holderness*, (who was one of the daughters and co-heiresses of the said *Maynhart*, Duke of *Schomberg* and *Leinster*) both deceased, of the first part; Count *Dengenfelt*, and *Mary* Countess *Dengenfelt*, his wife, (who was the other daughter and co-heiress of *Maynhart*, Duke of *Schomberg* and *Leinster*, who left no male issue,) of the second part; and certain persons appointed trustees, of the third part; the said Count and Countess *Dengenfelt*, in consideration of £42,500, conveyed their moiety of the said annuity of £4,000 to the said trustees, and thereby covenanted to levy a fine, &c. subject to the trusts therein mentioned, namely, as to part thereof for the purpose of selling the same to pay two sums of £18,000 and £20,000, part of the said purchase-money; and as to the residue of the said moiety, subject to the appointment of the Countess of *Holderness*.—The Countess of *Holderness* (then Countess of *Fitzwalter*) by will, appointed that the trustees should stand seised and possessed of the said annuity of £2,000, remaining unsold, and the moiety of the £100,000, upon payment whereof the same was redeemable, and all benefit thereof, upon trust to pay the same to Earl *Fitzwalter* for life; and after his death to pay thereout to *Robert* (the late) Earl *Holderness*, her son, for his life, the annual sum of £500, and after his death, to pay the said annuity to the first, and all and every the son and sons of her said son the said Earl of *Holderness*, and the heirs male of their bodies successively; and in default of such issue, to her said son and the heirs of his body, with such remainders over or reversionary interests as therein were mentioned; and after the decease of the said Earl *Fitzwalter*, to pay out of the said annuity of £2,000, and of the interest of the said moiety of £100,000, unto her daughter the Countess of *Ancrum* for her life, the further annuity or yearly sum of £500 for her separate use; and after the death of her said daughter, upon such trusts as were therein mentioned: and also in trust to pay the residue of the said £2,000, and of the interest of the said moiety of £100,000 to all and every the children of her the said Countess of *Holderness* (then *Fitzwalter*) by the said Earl *Fitzwalter*; and in default of such issue, in trust for the said *Robert* Earl of *Holderness*, for his life; and upon his decease, to pay the same to the first and all and every the son and sons of her said son; and the heirs-male of their bodies successively; and in default of such issue, to the said Earl of *Holderness* and the heirs of his body.—The testatrix died in 1751, leaving no issue by Earl *Fitzwalter*, but leaving issue by Lord *Holderness* her first husband, the late Earl of *Holderness* and the Countess of *Ancrum* (afterwards the Marchioness of *Lothian*) her two only children.

The plaintiff having become entitled to a separate fortune, subsequent to her marriage with the late Earl of *Holderness*, lent him the sum of £8,000, and as a security for the re-payment thereof

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to the Countess, he executed a bond to the said *Elborough Woodcock*. By indenture of assignment, dated in *February* 1778, made between the said Earl of *Holdernesse* and the said *Elborough Woodcock*, for the purpose of effectually barring and extinguishing all such estates and interests in possession, reversion, and remainder, limited by the said Countess *Fitzwalter*, in the said first mentioned annuity of £500, in the residue of the said annuity of £2,000, and for vesting in the said *Elborough Woodcock* the absolute property therein, upon the trusts therein mentioned; he assigned the said annuity of £500, part of the said annuity of £2,000 bequeathed to him for his life by the said Countess *Fitzwalter's* will, and the residue of the said annuity of £2,000, subject to the appointment of him the said Earl.

The said Earl of *Holdernesse* by will 1778, charged his personal estate with the payment of his debts, except the debt of £8,000 secured by the said bond, and *thereby directed that the said annuity, payable from the post-office, should be charged with the payment of the said debt of £8,000 and interest, in ease and exoneration of all other his effects real and personal*; and he devised all the rest and residue of his freehold, copyhold, and leasehold estates to his daughter *Baroness Conyers*, then *Marchioness of Carmarthen* for life, without impeachment of waste; remainder to *Elborough Woodcock*, to preserve, &c. remainder to the *Marquess of Carmarthen* for life; remainder to *Elborough Woodcock*, to preserve, &c. remainder to *Lord Danby*, (the *Marquess's* eldest son) for life; remainder to *Elborough Woodcock*, &c. with remainder to the first and all and every other the son and sons of the said *Lord Danby* successively in tail-male, with the like remainders to the two other children of the said marriage. And after reciting the said deed of assignment 1778, he directed that *Elborough Woodcock* should stand possessed of the said annuity of £500, and of the residue of the annuity of £2,000, and of all monies which should at any time arise from the redemption thereof, in trust in the first place for the raising of the said sum of £8,000, and subject thereto in trust for such person and persons, and for such and the same intents and purposes, as he had by his will devised his real estates; and he appointed the plaintiff residuary legatee and executrix, together with the *Marquess of Carmarthen*, and *Elborough Woodcock*, executors of his said will.—The testator died 1778, without altering his said will, leaving the plaintiff, his widow and relict, and the said *Baroness Conyers*, his only child.

The object of the bill was to have this sum of £8,000 raised and paid out of the annuity.

The defendants insisted, that the said £4,000 annuity was only to be deemed an interest of the £100,000, and that the said sum of £100,000 being by the grant and letters patent stipulated and directed to be laid out in the purchase of land, the same ought to be considered as land; and that the assignment of 1778, could not operate

operate so as to bar the entail directed by the letters patent; and that the same did not pass, nor was well charged by the testator's will, with the payment of the said debt of £8,000, and that the said annuity, upon the death of the said Earl, descended and became vested in Baroness Conyers, as the heir of the body of the said Earl her father, or as one of the heirs of the body of the said *Maynhart Duke of Schomberg and Leinster*, free from any incumbrance whatever.

Mr. *Attorney-General* and Mr. *Batt*, for the plaintiff, contended—that this property was to be considered as an annuity, and that the case of *Stafford v. Buckley*, 2 Ves. 170, and the principles there laid down, were analogous to the present case. That although it was granted as an annuity, payable 'till the sum of £100,000 should be paid, &c. yet there was no time pointed out, or any means inserted in the grant, for compelling the payment of the said principal sum. This is clearly an annuity according to Lord *Coke's* definition, Co. Lit. 20 a, and not *within the statute de donis*.

Mr. *Price*, Mr. *Hardinge*, and Mr. *Stainsby*, for defendants, insisted—that it was meant 'as money to be laid out in land, and that this case differed from *Stafford v. Buckley*, for that here the object was land: that it was merely a temporary provision, 'till that object could take place, which was not the case in realty: that this by no means savoured of the realty, as it was a mere annuity, payable out of the present fund, and as to the compulsion of payment, that might be effected by petition to the King in council. An inheritable annuity is to be deemed as land, and equally entailable with it, as in *Disher v. Disher*, 1 P. W. 204.

Lord Chancellor.—My notion of the nature of this fund is, that it was the grant of an annuity, and must consequently be considered in all its views as the mere grant of an annuity; for, though a right of redemption is reserved to the crown, and though in reserving that right of redemption, the crown hath shaped this grant of £100,000 so as when paid it should be land and not money, yet it is such a power as the crown may or may not act upon, and consequently must be deemed a grant of an annuity perpetual in its nature.—Notwithstanding such a power was reserved at the pleasure of the crown, the parties had a right to treat it as an annuity: and this Court will not keep up the objection (of its being land) in contemplation from century to century, because of the possibility of substituting the money in the place of the annuity: an object which might not happen in centuries after this. The Court will not operate upon this property as money directed to be laid out in land. My opinion is, that the vendors of the moiety would be obliged to accept of the money, but it would be discharged

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charged from the incumbrances; because incumbrances cannot affect this property so as to render it unalienable. The first question raised has been whether the family of *Holderness* have any interest in the moiety they purchased: and that question is founded upon a notion, that another family which had an interest many years since, and had accepted of the sum of £42,500 for it, sixty-five years ago, have now a right to insist they shall avail themselves of that point, and insist upon the annuity:—an annuity that *does not savour of lands*, and being *merely personal*, was capable of being conveyed with or without a fine; and the conveyance effectual. The main question is, whether the Earl of *Holderness* has sufficiently disposed of this property. Consider what the limitations are:—as to the £500 part of the annuity, his Lordship was tenant in tail, remainder to a stranger, with remainder in fee to himself;—as to the £1,000 the residue of the annuity, he was tenant in tail, with the immediate remainder in fee to himself:—thus possessed of it, his Lordship conveyed it to the defendant *Woodcock*. I do not consider what would be the nature of the assignment to *Woodcock*, if it were to be taken as money to be laid out in land, though I am clear, that in regard to the £1,000 his Lordship had the absolute dominion over it, having the immediate remainder in fee; but as to the £500 I am equally clear the other way, because of the intermediate remainder. To consider it merely as an annuity, the conveyance to *Woodcock* was proper: it is liable to the trust reposed upon it by the will of Lord *Holderness*, and the Master must be directed to raise, by sale or mortgage of the said annuity, or a sufficient part thereof, the said sum of £8,000 to be paid to the plaintiff, with costs of suit (a).

Ex relatione.

(a) See this case cited in the argument in *Priddy v. Rose*, 3 Meriv. 93. For the cases upon this subject, vide

Turner v. Turner, ante, 516, and the cases cited in the Editor's note.

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KITTEAR v. RAYNES.

KITTEAR, the father, being seised for life of a real estate, with remainder to his son the plaintiff in fee, the father and son joined in a mortgage of the premises, to raise money for the use of the father: the father afterwards became a bankrupt, and the mortgagee filed a bill (after the bankruptcy) and obtained a decree of foreclosure, and the estate was ordered to be sold.—The question now was, whether the son was entitled to be admitted to prove the value of his remainder in the estate as a debt, under the commission against the father, either, in his own name, or in that of the mortgagee.

Son having a remainder, joins his father in a mortgage, which is not paid off till after bankruptcy of the father. He cannot prove his interest under the commission.

Lord Chancellor thought he was not entitled to prove it at all as a debt under the commission; the mortgage not being paid off till after the bankruptcy (a).

(a) The doctrine upon this subject is altered by the 49 Geo. 3. c. 141. s. 8. Vide Co. Bank. Law, 7th edit. p. 221.

TREVES v. TOWNSHEND.

S. C.
1 Cox, 50.

BILL filed by creditors against the surviving assignee, and the executor of the deceased assignee of *Beale* and *Jones* bankrupts, to account for a large sum of money belonging to the bankrupts, with interest:—The commission issued 28th May, 1766: *Townshend*, a *Blackwell-hall* factor, and *Russel*, were elected assignees and received the money. They made no dividend. *Russel* paid the expences of the commission and died. A sum of £1,936 remained in the hands of *Townshend*, which he admits by his answer, but says he has always kept an equal sum at his bankers ready to answer it.

Money having been kept by the assignee of a bankrupt in his hands for several years, and no dividend made, ordered to be paid, with 5 per cent. interest, and all costs.

This cause was heard before the Lords Commissioners, 17th November last.

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Mr. Kenyon and *Mr. Jones*, for the plaintiff—stated the substance of the bill as above, and said there was a case where the assignees

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assignees had been ordered to pay interest for money so remaining in their hands *.

Mr. *Madocks* and Mr. *Scott*, for the defendants, said—the management of the business had been entrusted to *Carter*, the solicitor to the commission, who died, and his papers were sold as waste paper; and that here the assignees had not made interest of the money, and therefore ought not to account for it; that the money had always lain at the bankers, ready to make a dividend when called upon. No part of the money was laid out in the funds, nor was it any part of the trust of the assignees so to do.

Lord *Loughborough*.—*Russel* paid the costs of the commission, and all he received was only two sums, being dividends under other commissions. The other has paid nothing. It is the duty of the assignees to apply to the commissioners to make a dividend. They are bound to make it within a certain time, but the precise time must rest with them. The Court will set their eye against such a delay as this. If this was to be allowed, the office of assignee will be canvassed for: it would counteract the whole intent of the bankrupt laws. This is the grossest case possible; the assignee was so negligent he never called upon the clerk of the commission (who lived nine years after the commission) for the papers, so that the proceedings are lost, and the expence of a suit incurred by his negligence: it is a fraudulent neglect of the duty he had undertaken as assignee. The money of a merchant at his bankers does not lie idle, it is part of his stock in trade. This is the case as to *Townshend*: £1,936 is kept from 1766, under a trust that he should not keep it.—Therefore he must account for that sum and interest at the rate of five *per cent.* and pay all the costs of this suit, and of the subsequent enquiry †.

The defendant thinking himself aggrieved by this decree, particularly by the rate of interest, petitioned for a re-hearing, which came on before the *Lord Chancellor* in this term.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Bicknell*, for the petitioner; Mr. *Attorney-General* and Mr. *Jones*, for the plaintiffs.

Lord *Chancellor*.—The only doubt I have is as to the rate of interest; four *per cent.* is the interest usually given by the Court, and it is never to be exceeded but in a special case. I think the plaintiffs have established the fact, that this money was used by

* They did not name this case, but it was a petition, *Ex parte Ellington*, in the matter of *Tidswell*, heard at the Sittings after *Trinity*, 1783, cited ante, 375.

† Vide *Forbes v. Ross*, vol. ii. p. 430. *Ex parte Lane*, 1 Atk. 80. *Ex parte Hilliard*, 1 Vcs. jun. 89.

the defendant in his trade; and I want to know the fact whether in that trade five *per cent.* is made of the money employed, for I cannot give four *per cent.* interest for money of which five *per cent.* has been made.—*Lord Chancellor* offered the defendant's counsel a reference to the Master, to enquire whether five *per cent.* would be made of money employed in the trade of a *Blackwell-hall* factor and upon that being declined, affirmed the decree (a).

(a) See all the cases upon the subject of charging executors, trustees, receivers, assignees, &c. with interest, for balances kept in their hands, collected and arranged in the Editor's note to *Newton v. Bennet*, ante, 362. As to assignees in bankruptcy by the

49 *Geo. 3. c. 121. s. 4.* the law upon this subject is changed, and they are thereby rendered liable to be charged with interest at twenty *per cent.* for money wilfully retained or employed by them.

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THE ATTORNEY-GENERAL v. CRISPIN.

THE testatrix having given by her will several annuities, then gave, after the decease of the annuitants, £50 each to the children of *D. Riviere*:—*D. Riviere* had then seven children, six of whom died in the life-time of the surviving annuitant. He had also a daughter, born after the death of the testatrix, but in the life-time of the surviving annuitant. Two questions were raised, First, whether any interest vested in the six children who died in the life-time of the annuitants.—Against this was cited *Norris v. Huthwaite*, (ante, 182. note). Second, whether the child born after the will should take. Vested legacies.

The *Lord Chancellor* decreed that they were vested legacies, and that the after-born child must be let in to take.

(a) For the cases on this subject, vide *Dawson v. Killett*, ante, 119, and the cases cited in the Editor's note.

(d) HUGHES v. HUGHES.

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THOMAS CHAMBERLAIN, Esq. by will dated the 22d of July, 1779, vested his estates in trustees, to pay certain annuities, and subject thereto to pay the "rest and residue of the rents and profits, dividends and interest, for and towards the maintenance and education of all and every the children of his three daughters, (excepting such of his grandsons as should be in possession of real estates before devised) share and share alike, until the youngest of his said grand-children should attain his or her age

Maintenance not allowed by the Court, where the parent is of ability although directed by the will.

Where the parent is reported not of ability, the sums allowed shall be only from the time of the report, not of the decree.

(d) *Andrews v. Partington*, post, vol. iii. 60. *Munday v. Lord Howe*, post, vol. iv. 223. e contra, *Hosie v. Pratt*, 3 Ves. 732.

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of twenty-one years,"—and in case of the death of any of his grand children (before the youngest should have attained the age of twenty-one years), who should have married and have issue, that the child or children should be entitled to the share of the parent so dying.

Upon the hearing of the cause, the *Lord Chancellor* refused to direct the Master to consider of a proper allowance for the maintenance of the younger children of the testator's daughters; holding the residue of the rents, &c. to be an accumulating fund for the benefit of the children, and to be paid to them when the estates became divisible; and that, until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, &c. of the estates to be so applied.

Mr. *Attorney-General* and Mr. *Hollist* now moved, on the part of the defendants—that the minutes of the decree should be amended, by inserting a reference to the Master to consider of a proper allowance to the parents for the maintenance of the children.—They stated that Dr. *Kennedy*, the husband of one of the daughters, had by her seven children, whom, though without an allowance, he might support agreeably to his own rank, he could not in proportion to the additional fortunes derived from the testator. That the rule was, that wherever a maintenance was given by the will, the child should have it, and they cited a case where the direction was, that sum for maintenance should be paid to the father; and the present *Lord Chancellor* ordered a future maintenance to be allowed, and upon further application ordered a sum to be paid for the maintenance of the children, prior to the first application.

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The *Lord Chancellor* said—the practice was to refer it to the Master to enquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance, and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father, under which circumstances it was a legacy to him.—His Lordship referred it to the Master, to enquire into the ability of the parents to maintain the children; and afterwards, upon petition, sums were ordered to be allowed for that purpose to Dr. *Kennedy*, who was reported not of ability to maintain his children; but although the Master made the allowance from the date of the decree, the *Lord Chancellor* confined it to the date of the report (a).

(a) The subsequent cases upon this subject are collected in a note to *Andrews v. Partington*, post, vol. iii. 60.

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(c) SAWYER v. BOWYER.

MR. Price moved to suppress depositions, because they had been taken before the Master upon the same matter upon which the witness had been examined in chief, without a special order for the re-examination.

The Lord Chancellor.—A witness is not to be re-examined before a Master, upon the same interrogatory upon which he has been examined in chief; yet I should have thought upon a substantially different interrogatory he might: but I find it cannot be done without leave; this was laid down in *Browning v. Barker* (a) in 1774, by the Chancellor and Master of the Rolls. If the interrogatory misled the witness out of the matter in issue, the interrogatory must be suppressed, and the deposition falls with it. As to other matters, you may except before the Master; but it appears the examination, if to the same matter, must be by order, otherwise it is practising upon the witness. Prac. Reg. 165.

Motion granted.*

(c) His Lordship doth, by consent, order that upon payment to Bowyer and his wife, £5 for their costs, the depositions taken in these causes do stand. Reg. Lib. B. 1783, p. 484.

* In *Vaughan v. Lloyd*, 1st February, 1787, it was held that witnesses examined before hearing, cannot be examined upon a commission afterwards without leave. *Sandford v. Remington*, 1 Ves. jun. 398 (b).

(a) 2 Dick. 508.

(b) The case of *Vaughan v. Lloyd* is since reported 1 Cox, 313. Vide also *Parcell v. Macnamara*, 17 Ves. 434; also

Sandford v. Paul, post, vol. iii. 369, which is the same case as *Sandford v. Remington*, cit. sup.

MAWER v. MAWER.

THIS was a bill of foreclosure: The defendant had been served with a *subpœna*, but had never appeared, and the plaintiff had proceeded to attachment and sequestration. The defendant not being found on any of these processes, and the sequestrators having returned that he had no real or personal estate; a motion was made that he might be ordered to appear upon a day certain, and the order inserted in the *London Gazette*, and otherwise published as directed by 5 Geo. 2. c. 35, to the end that the bill might be taken *pro confesso* under that act, notwithstanding he had been served with a *subpœna*, and had absconded since.

Order for defendant to appear under 5 Geo. 2. c. 25. notwithstanding a *subpœna* had been served.

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Motion granted.

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Lincoln's-Inn
Hall, 8th July,
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Two legacies, of
equal sums, being
given to the same
person, the one
by the will, the
other by a codicil,
the legatee shall
take both.

RIDGES v. MORRISON and others.

NICHOLAS TOKE, of *Linton*, in the county of *Kent*, made his will, dated the 16th of *November*, 1763, duly attested to pass real estate, and thereby ordered his real estates (consisting of gavel-kind lands), to be sold by his executors, and the money applied in aid of his personal estate. He then gave several legacies, and among the rest to *Nicholas* and *Mary Layton*, the children of his nephew *Isaac Layton*, £500 each. He made *Morrison* and *Phumley*, two of the defendants, his executors, and the plaintiffs and the other defendants are his heirs at law, next of kin and residuary legatees.—By a codicil, written under his will, dated 1781, he gave to *T. Ashby* £20, and to “*Nicholas Layton*, that I put apprentice to a grocer near *Cripplegate*, £500.” This *Nicholas Layton*, mentioned in the codicil, is the same *Nicholas Layton* to whom £500 was given by the will. The bill prayed (among other things) that *Nicholas* should be decreed to be entitled to only one of the sums of £500, and he, by his answer, claimed both the sums.

It was argued the 7th of *May* last, for the plaintiff—that the sums being equal, the legacy in the codicil was a mere repetition of the bequest in the will, and all the parties being in equal relationship to the testator, he meant them equal bounties; that the rule was, that when the same precise sum is given in the will and codicil, it is mere repetition not duplication, the *Duke of St. Alban's v. Beauclerk*, 2 Atk. 636.—To this it was answered, on the part of *Nicholas Layton*, the legatee, that the case of the *Duke of St. Alban's v. Beauclerk*, stood upon the particular circumstances; the will reserved the power to make a codicil, so that the will and the codicil became one act. *Swinburne*, in the passage there cited (*part 7. c. 20. fol. edit. 526.*) says, that the will and codicil are distinct instruments, and that a legacy given in each is accumulative, and it was so determined in *Hookey v. Hatton*, before Lord Bathurst, Hil. 1773.—The cause stood over from time to time, and this day the Lord Chancellor gave judgment. The Reporter was absent, but has been favoured with the following note of what passed.

Lord Chancellor.—There is no occasion for any further argument as to the point in this cause, for I take the rule to be established; a doubt however has arisen, as to a distinction taken between this and the case reported.

The

The case of **Hooley v. Hatton* was examined with abundant care, and it is unnecessary to repeat the cases again, after reading the

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* As the present case was determined upon that of *Hooley v. Hatton*, and a particular reference made to it by the *Lord Chancellor*, and especially to the opinion of *Mr. Justice Aston*, it was thought proper to add the following note of it, taken by the present Reporter at large :

The Lady *Isabella Finch* by her will, bearing date the 30th of *August*, 1768, gave to *Lydia Hooley* her woman the plaintiff, a legacy of £500. The will was executed in the presence of two witnesses. By a codicil, she gave *Lydia Hooley* £60 to be paid her; she afterwards made a second codicil, dated the 28th of *October*, 1769, in these words, "I add this codicil to my will, I give *Lydia Hooley* £1,000"—this was in her own hand-writing, but not executed before witnesses.

The plaintiff filed her bill for the said legacies and annuity. The question was, whether the last legacy alone passed, or the legatee should have both the £1,000 and the £500. The Master of the Rolls had decreed both to the plaintiff, and defendant appealed to the *Chancellor*, who was assisted by the Lord Chief Baron *Smythe* and *Mr. Justice Aston*.

This case, after having been argued very much at large, stood over till *Hilary Term*, when the Court gave judgment.

Mr. Justice Aston.

There is in this case no internal evidence, therefore we must refer to the general rule of law.

The counsel applied the rules laid down in the case of *Beauclerk v. The Duke of St. Alban's*. It is evident those rules are not general, but go on the particular circumstances of that case. It was contended there, that the fourth codicil was to stand in the room of the first.

There are four cases of double legacies :

First, where the same specific thing is given twice.—*Cujacius* takes a distinction between the same *res* and the same quantity. In the first case, it can take place but once, at *eadem quantitas sapius præstari potest*.—*Digest*, l. 22. T. 3. l. 12. *Cuj. op. t. 4.* 381, 382.—Secondly, where the like quantity is given twice.—*Lord Hardwicke* (in *Beauclerk v. The Duke of St. Alban's*) alluding to the particular circumstances of the case laid down, one only should be taken, unless an intention appeared to the contrary.—*Digest*, 34. T. 4. l. 9, but nothing can be collected from hence, as the title of the *Digest* must be attended to, which expressly says *animo adimendi*.—*Godolphin's Orphan's Legacy*, Pt. 3. c. 26. § 46.—*Swinburne*, 526. 530. (ed. 1728.) where £100 and £100 legatee entitled to both. The doctrine from repetition of two equal sums in one will being bad, and in a will and codicil being good, attributing the former to forgetfulness, is strange.—The case of the *Slaves*, *Dig.* 34. T. 1. l. 18, and that in 2 *D'Aguesseau* pleading the first, page 21, are upon entirely different principles. It would be strange to suppose *Lord Hardwicke* applied this as a general rule, which would be inconsistent with his recognizing (as he did expressly) the authority of *Swinburne* 526. 530, but said that the case before him was different from the internal evidence.

In regard to the cases in the *Roman law*,—first, where equal sums are given in two distinct writings, both shall pass by the *Roman law*, and the decisions of this Court are agreeable thereto.—*Digest*, 22. T. 3. l. 12, and *Gothofred's note in diversis Scripturis*.—*Digest*, 30. T. 1. l. 34. in *eadem Scriptura*.—*Cujacius*, 4. 381, distinguishes between a *corpus* and quantity.—*Voet* on the 31. and 32. *Digest*, *Godolphin*, pt. 3. c. 26. § 46.—*Swinburne*, 526.—*Ricard traite des donations*.—*Wallop v. Hewit*, 2 Ch. R. 70.—*Newport v. Kinnaston*, *Finch*, 294.—*Menochius de præsump.* l. 4. 2 Ch. Rep. 58.

Thirdly, As to the less sum in the latter deed, as £100 by will, and £50 by the codicil, the legatee shall take both, *Godolphin*, pt. 3. c. 25. § 19. *Rydout v. Payne*, Ch. Ca. 301.

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Fourthly,

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the very able opinion of Mr. Justice *Aston*, which contains the whole doctrine of the law upon the subject. The *rule* there laid down

Fourthly, As to a larger sum after a less, Ricard 421, folio edition, says,—where they are in the same instrument, the two sums are not blended, but the legatee has two legacies; and the heir must shew that the one was meant to be blended with the other, the presumption being in favour of what is written. *Wyndham v. Wyndham. Pit v. Pigeon. Masters v. Masters.*

The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the same cause in the same act, and *totidem verbis*, or only with small difference; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation, and therefore *Lydia Hooky* is entitled to both the sums of £500 and £1,000.

Lord Chief Baron *Smythe*.—I am clearly of the same opinion, and therefore shall be very short.

The intention is the clearest rule, but it is admitted on all hands, here is no internal evidence, we therefore must refer to the rule of law.—The rule of law is different with respect to a *corpus* and to quantities.

On the other side was quoted the *Mayor of London v. Russel*, Finch, 290, where the words were satisfied by some goods.—In the *Duke of St. Alban's v. Miss Beauclerk*, the last codicil was evidently the same as the first.

Lord Chancellor.—It would be sufficient for me to say, I am of the same opinion, if Mr. Justice *Aston* had not referred to me with respect to some of the cases.

By the civil law, where two pecuniary legacies were given by the same will, the legatee must prove it was to be doubled; but where the two bequests are in different writings, there the presumption shall be in favour of the legatee.

No argument can be drawn, in the present case, from internal evidence, we must therefore refer to the rule of the civil law.

In the case of the *Duke of St. Alban's v. Beauclerk*, Lord *Hardwicke* laid down the rule as applicable to that case, and not as a general rule.—“This question (said Lord *Hardwicke*) divides itself into two different parts.”—“I am of opinion, that upon the reason of the thing, and according to the best writers, these legacies being in different writings will make no difference in this case.”—Neither was it put upon being one instrument, certainly they are different.—“And as the will and codicil make but one will.—Lord *Hardwicke* quoted Gothofred, *immo hæres priorem probare inanem esse non tenetur*; but did not speak of proving both will and codicil, as he is represented to do in the report.—Then Lord *Hardwicke* considered the internal evidence, and added, “by the power reserved in her will, she has shewn her intent to make them one instrument*,”—which words are omitted in the report.

Lord *Hardwicke* probably thought that Sir *Joseph Jekyl*, in *Masters v. Masters*, gave two reasons, where he seems to give only one: I will hazard a conjecture upon the pointing of the report, 1. P. W. 424, the semicolon in the passage, “should not be taken as a satisfaction unless so expressed; that it was, &c.” was wrong placed, and should be after the words,—“that it was,” by which means the passage would stand, “should not be taken as a satisfaction, unless so expressed that it was; as if both legacies had been given by the same will, &c.”—This case, therefore, is an authority in point, because there are two distinct writings.

So in *Wallop v. Hewit*, 2 Ch. Rep. 37. The Register's book shews that the case went upon the general doctrine of the civil law, and not on any internal evidence.

His Lordship further cited *Wyndham v. Wyndham*.—*Master of Christ's Hospital* (alias *Mayor of London*) *v. Russel*.—*Newport v. Kinnaston*.—Finch, 294 Ch. Ca. 301.—*Pit v. Pigeon*.—3 *Huber Prælectiones Leg. Civ.* 122, and *Stirling's*

* The Lord Chancellor read the words marked with inverted commas from Lord *Hardwicke's* original note.

down seems to be *this*, that where a testator gives a legacy by a codicil as well as by a *will*, whether it be *more*, *less*, or *equal*, to the same person who is a legatee in the will, speaking *simpliciter*, it is an accumulation; and it is incumbent upon the executor to produce evidence to the contrary, if he contests such *accumulation* (a): on the other hand; the rule of *exclusion* has gone upon *very slight grounds*, according to former authorities. The common case where the legacies have not been held to the accumulative is, where the same *corpus* (according to the *Digest*) is given *twice* to the same person, the second legacy *nil operatur*, because it cannot be given more than *once*. Where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and rejected the *accumulation* (b): but where the same quantity is given, with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing, *prima facie*, should accumulate, the Court has decided in favour of the *accumulation*. In the present case it happens that an additional *cause*, or mark of *favour*, has been mentioned in the codicil, which proves that the testator meant and intended an *accumulative legacy*. Considering the slight inferences made in former cases, (and which I must own have tended

case, (in *Scotland*) 2 Fountainhall, 231—and concluded with saying, I have therefore the satisfaction to think, we confirm Lord Hardwicke's opinion.

The decree of the Master of the Rolls affirmed.

This case of *Hooley v. Hatton* was also relied upon by the Master of the Rolls, (Sir Lloyd Kenyon) in deciding the case of (f) *Foy v. Foy* (c), 1st February, 1785, where Sidney Hollis Foy by his will, 26th May, 1782, gave, among other legacies, to John Hopley Simpson, Esq. £100, and to Newman Knowles, Esq. £100. The testator afterwards, by a codicil, 10th December, 1783, gave to Mr. Simpson £100, and to Mr. Knowles £50, and his Honour decreed both sums to be paid to the legatees.

In this case also, there were three legacies given in the will and codicils to Dr. John Jebb, and his Honour thought him entitled to them all; but he refused to take more than one (d).

(f) The report of the above case is correct, but the decree was most probably never inrolled, as it is not to be found in the Register's book: see *Barclay v. Wainwright*, 3 Ves. 462, and 467, where his Honour disapproves of the above authority.

(a) As to the admission of parol evidence in these cases, vide *Coot v. Boyd*, post, vol. ii. 521, and the Editor's note.

(b) Sir W. Grant, in the case of *Benyon v. Benyon*, 17 Ves. 42, cites the above passage; and also the observations of Lord Thurlow in *Moggridge v. Thackwell*, post, vol. iii. 517. 1 Ves. Jan. 464; that "simple repetition, where it is exact and punctual, has been regarded as sufficient proof that it is only intended for repetition," as shewing that the point whether the more circumstance, that legacies, even

by different instruments, are of the same amount, raises a presumption against their duplication, is upon the authorities left in some degree of doubt; vide note at the end of the case.

(c) Since reported, 1 Cox, 163.

(d) This was not so, vide post, vol. ii. 523. Though he claimed all the three legacies by his administrator, yet at the hearing he admitted by his counsel that the testator only intended to give him one, and in consequence his Honour declared that he was only entitled to one legacy.

1784.

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RIDGES
v.
MORRISON.

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RIDGES
v.
MORRISON.

to throw property into jeopardy and uncertainty) such an inference as arises in this case is sufficient to turn it the other way, and to induce the Court to say, that it operates as an *accumulation*. In the will, the legacy of £500 is given to *Nicholas Layton* (the testator *enumerating him among the other children of Isaac Layton*) upon the *general consideration* of favour which the testator bore towards the family: the other legacy of £500 in the *codicil* is given with this additional mode of description adjoined to it: "To *Nicholas Layton the child*, whom I have put out an apprentice," which circumstance marks the legatee as a peculiar object of favour, and, consequently, such an inference of the testator's intention as to induce the Court to say it is an *additional legacy* (a).

(a) In general, (except as far as that doctrine is affected by the doubts alluded to in note (b) in the last page,) where two legacies of quantity are given *simpliciter* to the same person by different instruments, the presumption shall be, that they were intended as cumulative, and not that one should be a substitution for another; and very slight circumstances have been considered as sufficient to shew a testator's intention either one way or the other. *Foy v. Foy*, 1 Cox, 163. *Baillie v. Butterfield*, ib. 392. *Campbell v. Earl of Radnor*, ante, 271. *Reay v. Hopper*, Rolls, Mich. 1785, and *Jackson v. Jackson*, June 23, 1788. cited by the

Editor of the 3d edition of this work, and the latter case, 1 P. W. 420, in *Coote v. Boyd*, post, vol. ii. 521. *James v. Semmens*, 2 H. Bla. 213. *Allen v. Callow*, 3 Ves. 289. *Barclay v. Wainwright*, ib. 462. *Osborne v. the Duke of Leeds*, 5 Ves. 369. *Benyon v. Benyon*, 17 Ves. 34. *Currie v. Pye*, ib. 465. The instruments must bear *different dates*, for that Lord Alvanley said, 3 Ves. 294. he must always guard it with, and added a hope that the Ecclesiastical Court would not go on to prove papers without date. As to where different legacies are given to the same person in the same instrument, vide *Curry v. Pile*, post, vol. ii. 225.

Lincoln's-Inn
Hall, 20th July.

(g) BILLINGS v. SANDOM.

Bequest of
£1,000 to tes-
tator's sister, and
in case of her
demise, £800 to
A. and £200 to
B. the sister en-
titled for life,
then to go in the
proportions.

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THE testator being at *Gibraltar*, made his will, containing the following bequests: "I give to my sister *Sarah Sandom* the sum of £1,000, and, in case of her demise, I give to *James Billings* (the plaintiff) £800, and to *John Billings* £200." He then gave several pecuniary legacies, and went on; "And I give unto my sister, whom I leave my sole executrix, whatever goods and chattels, or money, which may be due to me at the time of my death, to be disposed of as she shall think proper." The plaintiff filed this bill against the sister, to have his interest in the £800 secured to him after her decease.—The question arose upon the words of the will, in *case of her demise*; whether they meant her death generally, or her dying in the life of the tes-

(g) I give and bequeath unto my sister *Sarah Sandom*, the wife of *Andrew Dunbar Sandom*, the sum of £1,000 sterling, and in case of her demise, I do bequeath unto my cousin *James Billings*, the sum of £800 sterling; and unto my cousin *John Billings*, brother of the said *James Billings*, the remaining sum of £200 sterling. Reg. Lib. A. 1783. p. 732.

tator.

tator.—For the plaintiff, the first construction was insisted upon, and supported by the residuary devise, which his counsel argued was inconsistent with the idea of her dying in the life-time of the testator. He therefore intended her to have the use of the £1,000 during her life, and then to divide it between the plaintiff and *John Billings*, in the proportions in the will.—For the defendants, it was insisted that the penning of the devise arose from a doubt in the mind of the testator, whether his sister was, or was not alive: on the contingency that she might have died during his absence, he meant to divide the £1,000 between *James* and *John Billings*, but not if she was alive. The words were clearly contingent, and could not mean a general dying. As to the argument from the residue, he did not know that, in case of her being dead, the legacy would lapse.

1784.

Billings
v.
Sandom.

Lord Chancellor said, according to the best construction he could put, the testator meant to give a share of his bounty to his sister, and also to the others: the word *and* implied this; therefore, that she should have it for life, and then they should take it. As to the residuary devise, he meant, she should take that unfettered, at her own disposal, but the other fettered by the gift over.—His Lordship decreed the money to be paid into the bank, the sister to receive the dividends for life, and after her decease the principal to be divided, in the proportions directed in the will (a).

(a) In these cases, as observed by Sir *W. Grant*, 8 Ves. 413. the difficulty is to ascertain what the testator intended by applying words of contingency to an event that is certain, viz. death. A construction therefore is absolutely necessary, either that whenever the first legatee dies the other shall take; or that if the first is prevented from taking, by dying in the life of the executor, the other shall be substituted for him: in other words whether it means an interest for life to one, with

remainder to the others; or only that in case the one does not take, the other shall. The cases in which the former construction has prevailed, are the present, *Nowlan v. Nelligan*, post, 489. and *Lord Douglas v. Chalmer*, 2 Ves. jun. 501. Where the latter has prevailed, *Hinckley v. Simmons*, 4 Ves. 160. *King v. Taylor*, 5 Ves. 806. *Turner v. Moore*, 6 Ves. 557. *Cambridge v. Rous*, 8 Ves. 12. *Webster v. Hale*, ib. 410. *Omunaney v. Bevan*, 18 Ves. 291.

Lord HINCHINBROKE v. SEYMOUR.

BY settlement on the marriage of the plaintiff with Lady *Elizabeth Montagu*, daughter of the late Earl of *Halifax*, certain lands were settled in trust, for Lord *Halifax* for life, remainder to plaintiff for life, remainder to trustees for a term, with other usual remainders. The trusts of the term were, “that in case there should be any children of the plaintiff, by Lady *Elizabeth*, the

when she is fourteen, and she dying, files his bill for it as her administrator; the portion shall not be raised for the father.

“ trustees

A power in a settlement to raise a portion for a younger child at such time as the parent should direct; he directs it to be raised

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Hall, 20th July.

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HINCHINBROKE
v.
SEYMOUR.

“ trustees should, either in the life-time of the plaintiff, if he
“ should so direct, and the Earl of *Halifax* should be then dead,
“ or else, after the decease of the survivor of them, the plaintiffs
“ and the said Earl, by mortgage, sale, or other disposition of the
“ lands, raise such sums of money, for the portions of the child
“ or children of the marriage (except an eldest son) as thereafter
“ mentioned; that is to say, if but one younger child the sum of
“ £10,000 to be paid *at such time* (the said Earl being then dead)
“ as the plaintiff should, by any deed attested as therein mentioned,
“ or by will appoint.”

The issue of the marriage were one son, and one daughter, *Carolina Maria*. Lord *Halifax* died in 1771, and Lady *Hinchinbroke* being also dead, in 1781, Lord *Hinchinbroke*, by deed duly executed under the power, directed the trustees to raise the £10,000 *immediately*; the daughter being fourteen years old (a).—She died in 1782, and the plaintiff, as administrator to her, filed this bill against the trustees to have the £10,000 raised for his own use.

Lord Chancellor.—(h) The meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time.

And although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes, but this is against the nature of the power.

Bill dismissed without costs (b).

(h) *Pawlet v. Pawlet*, 2 Vent. 366, as to his Lordship's observation respecting portions.

(a) Lord *Eldon*, in *M'Queen v. Farquhar*, 18 Ves. 479, remarked, that the father, at the time of the appointment, thought the daughter was in a consumption. The ground of the present decision was the circumstance of the appointment being a fraud upon the power, as observed by Lord *Manners*, in *Palmer v. Wheeler*, 2 Ba. & Be. 29. it is a principle well established, that a father having a power of appointment, cannot derive a benefit to himself from the execution of it. The above cited case of *M'Queen v. Far-*

quhar, was endeavoured, but ineffectually, to be brought within the authority of the present case.

(b) As to the question how far a general power of appointment may be restrained to a particular purpose, where the intention of the parties demands such construction, vide the opinions of the Judges in *the Earl of Tankerville v. Coke*, Mose. 146. as contrasted with the determination of *Long v. Long*, 5 Ves. 445. and Mr. *Sugden's* observations upon them, and the present case, *Powers*, 262. 438. 455.

1784.

Sir JAMES LOWTHER, Bart. and another - - Plaintiffs.

The Viscountess Dowager of ANDOVER, ——— }
 BAGOT, Esq. and Lady FRANCES his Wife, late } Defendants.
 Lady FRANCES HOWARD, and others, - - }

Lincoln's-Inn
Hall, 24th July.

THE late Earl of *Suffolk* being seised, by virtue of marriage-settlements, of the premises which were the subject of this suit, for life; with remainder to Lady *Andover* for life; remainder to Lady *Frances Howard* in fee; and having no son, but having one daughter, the Lady *Diana*, since married to Sir *Michael Le Flemming*, Bart. and being desirous of purchasing the remainders expectant upon his own life, in order to settle the whole estate upon the marriage of his daughter, entered into a correspondence with Lady *Andover* and Lady *Frances Howard* for the purchase of their interests. In the mean while, the marriage being about to take place, Lord *Suffolk* covenanted with the plaintiff Sir *James Lowther*, and another of the plaintiffs, trustees in the marriage settlement, to endeavour to purchase the interests of Lady *Andover* and Lady *Frances Howard* in the estates, and that, when purchased, they should be conveyed to the uses declared in that settlement. After the marriage of Sir *Michael Le Flemming* with Lady *Diana*, the terms of the purchase were settled by letter between Lord *Suffolk*, and Lady *Andover* and Lady *Frances*, at the sum of £40,000. But before that contract was carried into execution the Earl died. The trustees in the marriage settlement filed this bill against Lady *Andover*, Lady *Frances Howard*, and Mr. *Bagot*, to whom she was since married, the trustees of their marriage settlement, Sir *Michael Le Flemming* and Lady *Diana*, praying, among other things, a specific performance of this agreement, for the purchase of the remainders under the former settlement; and that the estates, so purchased, might be conveyed to the uses declared in the present settlement.

Bill for specific performance against vendor, the vendee being in possession, and an account, being necessary of the vendee's personal estate, —referred to the Master to fix a short day for the payment of the purchase-money, otherwise the bill to be dismissed (*quoad hoc*) with costs.

The case was heard before the late Lords Commissioners, 5th of *August*, 1783, who ordered an account to be taken of the personal estate of the late Earl; and that the contract between him and the defendants, Lady *Andover* and Lady *Frances Howard*, should be specifically carried into execution, and the estates conveyed according to the prayer of the bill, but specified no time for the conveyance of the estate and payment of the purchase-money.

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The defendants Lady *Andover* and Lady *Frances Howard*, thinking themselves aggrieved by this omission in the decree, petitioned for a re-hearing, which came on this day before the Lord Chancellor.

Mr.

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LOWTHER
v.
ANDOVER.

Mr. *Ambler* and Mr. *Lloyd*, for the defendants.—In the old bills for specific performance, the practice was for the plaintiff to undertake to perform his part of the contract, although that practice is now discontinued. The inconvenience, in this case, of no day being fixed for the payment of the money is manifest. The defendants are bound to convey, the plaintiffs not bound to pay till after the account taken, which may be a very long time hence. In the mean while they pay no interest, and from the circumstance of Lord *Suffolk's* being tenant for life, they continue in possession without payment of rent, which cannot be enforced, as no ejectment will lie on account of the executory contract, which would be a sufficient defence, as appears by a * case in *Cowper*.

Mr. *Mansfield*, for the plaintiffs.—The defendants complain that they have not had a decree of such nature as never was pronounced in any cause whatever. The only extraordinary circumstance is, that the purchasers are in possession; but the parties are in no sort of risk, the reference is going on, and has already advanced a considerable way.

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Lord *Chancellor* observed, as to the old practice stated, that it was very proper there should be such an admission, but the filing the bill, in fact, amounted to it, and he did not remember an instance of a decree personally against a plaintiff to pay the money, founded upon such an undertaking. With respect to the executory contract being a defence to an ejectment to recover the possession, he said he doubted whether that was law; but he could not, on that ground, alter the practice of this Court:—but his Lordship varied the decree in the manner prayed, by ordering it to be referred to the Master to appoint a short day for the payment of the money, and to compute subsequent interest till that time; and if, upon tender of a sufficient conveyance, the principal money and interest should not be then paid, the plaintiff's bill to be dismissed (*quoad hoc*) with costs(*b*).

* *Weakly, ex dimiss. Yea, Bart. v. Bucknel, Cowp. 473.*—The point in this cause is now *sub lite*, in the Court of *Exchequer* Chamber (*a*).

(*a*) For the amount of the proceedings in the *Exchequer* Chamber, vide Mr. East's note to *Doe dem. Shewin v. Wroot*, 5 East, 138, where all the cases in which Lord *Mansfield's* doctrine was repudiated are collected, also the

case of the Lessee of Lord *Massey v. Touchstone*, 1 Sch. & Lef. 67. n.

(*b*) Vide *Mackreth v. Marler*, 1 Cox, 259. Sugd. Vend. & Purch. 341, 342, 419.

WOODBRIDGE v. HILTON.

1784.

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S. C.

2 Dick. 640.

Lincoln's-Inn  
Hall, 2d August.  
Award.

**L**ORD Chancellor was of opinion, that where a matter in a cause had gone to a reference, the party could not except to the award, but it must come on upon further directions (a).

(a) The note of this case is at greater length in Dickens; the Lord Chancellor is there represented as taking a distinction between where the matter referred to arbitration, is *ad computandum* merely, in which case an exception will lie, the reference being

merely substituted for the Master, but not where the reference is of all matters in dispute. See further as to this, *Rice v. Williams*, post, vol. iii. 163. *Dick v. Milligan*, post, vol. iv. 117. 536. and Caldwell on Arb. 185.

◆

*Ex parte* MITFORD.

**I**N the bankrupt's marriage-settlement, there was a covenant, that he should pay to the trustees, to the uses of the settlement, £6,000 by instalments, viz. £1,000 at the end of seven years, and £1,000 *per annum* afterwards, until the whole should be paid, so that the sum of £6,000 should be paid in twelve years, if the bankrupt should so long live; if he should not, then the whole was to be paid within one year after his decease, if the wife or any child of the marriage should be then living, if not, then £3,000 only was to be paid. The husband, under the settlement, took a life-interest in several annuities belonging to the wife, and also in some four *per cent.* annuities of the year 1780. The husband became bankrupt just before the end of the first seven years.—This was a petition to be admitted to prove the £6,000 as a debt under the commission. For the petition it was argued, that this whole debt was sufficiently certain to be capable of being paid; or if the whole was not, at least the £1,000 payable at seven years was certain, and the contingency only affected the subsequent instalments; and also, that the £3,000 which was to be paid in all events, within a year after the husband's death, was certain, and capable of a value to be now set upon it. In a case before Lord Bathurst, the trustees were permitted to prove, although there was a contingency as to the wife's surviving.—So in the case of a bond to do several things, and a breach as to one, the Court would let in the proof of the bond.—The counsel cited *Pattison v. Bankes*, Cowp. 540. and *Ex parte Cottrel*, *ibid.* 742. where the bankruptcy happened before any payment became due, and the proof was ordered.—On the other hand, it was argued that in this case the whole was merely contingent; that it does not appear whether £6,000 or only £3,000 will be due. If it is merely a contingent debt, it cannot be proved.

Lincoln's-Inn  
Hall, 11th August.

Sums secured by covenant in marriage-settlements, those which are certain, though future, are provable with a rebate of interest, and also of the value of the husband's claims, against the trustees.

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Lord

1784.

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MITFORD.

*Lord Chancellor* said—It was a question, whether these were not mutual demands, the husband having rights against the trustees, as to which the assignees must stand in his place. As to the £3,000 that would certainly become due; the only contingency was, whether there would, or would not, be £3,000 more: therefore he ordered that the trustees should be admitted to prove the £3,000, and the assignees would have a right to claim whatever the bankrupt could claim against the trustees, and that there must be a rate upon the value of those funds (a).

(a) The marriage settlement of the bankrupt is stated at length, in *Mitford v. Mitford*, 9 Ves. 87, and the present order from the secretary of bankrupts' book, in *Ex parte Barker*, ib. 114. the latter is also given *verbatim*, as read by Sir W. Grant, in his judgment in the late case of *Priddie v. Rose*, 3 Meriv. 105. It declares that the petitioners were creditors for £3,000 only, and were entitled to retain the value of the bankrupt's equitable interest under the settlement; and it was referred to the commissioners to compute interest from the date of the commission to the respective days on which the three several sums of £1,000 would become payable, which was to be deducted from the £3,000; that the commissioners should set a value upon the bankrupt's interest under the settlement, and the value thereof should be deducted from what should remain of the £3,000 after the rebate of interest, the petitioners to be admitted creditors for the then residue of the £3,000; that the interest of the bankrupts under the settlement should be retained by the petitioners towards satisfaction of the £3,000, and that the dividends upon the sum for which they should be admitted creditors, should be laid out in 3 per cent. bank annuities, and the interest to accrue thereon should be paid from time to time to the assignees.

It seems extremely doubtful whether the admitting the trustees to prove to the amount of £3,000 was a correct decision. The proposition that that sum was certainly payable is true, but it was payable at different and uncertain periods; in one event at three given times; in another, in a gross sum within a year after the bankrupt's death; accordingly Lord Eldon, in the above cited case of *Ex parte Barker*, expres-

sed considerable doubt of the propriety of the decision: after remarking that the direction as to the rebate of interest was properly given, provided the husband lived to pay those sums; his Lordship noticed the difficulty, that before the first of those periods the husband might have died; and the whole £3,000 might have become payable within a year, in which case that would not have been the proper mode of payment of the debt, and his Lordship intimated an opinion that the certificate would not have barred the £3,000; he therefore considered the decision as something like a compromise, and that the interest in that possible event had been overlooked, and asked how the court could have dealt with the case, if that event had happened by which a cause of action after the bankruptcy would have arisen, entitling them to call for the sum of £3,000 within the year.

Upon the subject of contingent debts of this nature, vide *Stratton v. Hale*, post, vol. ii. 290. *Studdy v. Tingcombe*, 5 Ves. 695. *Ex parte Mart*, 8 Ves. 355. *Buseri v. Serra*, 14 Ves. 313. *Ex parte Alcock*, 1 Ves. & Bea. 176, and Co. B. L. 223. et seq. *Ex parte Jacob*, 1 Eden, 174, and the cases there cited.

Upon the other point in this case, Sir W. Grant, in the above cited case of *Priddie v. Rose*, held, under the authority of this order, that the trustees in a marriage settlement had under similar circumstances an equity of stopping certain funds to which the husband was entitled under the settlement; that he could not by an act without their knowledge and consent deprive them of that equity, and that his assignee of those funds could only take liable to the same equity to which the assignor was liable.

Ex parte

1784.

*Ex parte* ANGERSTEIN.

**T**HIS was a petition, that the brokers who had insured ships with *Calverly Bewick*, who under-wrote separately, might prove their debts against his separate estate, and not against the partnership. It appeared that the account the brokers kept was always with the partnership.—Mr. *Ford*, in support of the petition said, that the suffering the brokers to prove these debts against the partnership, would be in the teeth of the act of 6 Geo. 1. c. 18.

Lincoln's Inn  
Hall, 11th August,  
Proof of debts  
arising upon in-  
surances of ships,  
must be against  
the separate, not  
joint estate.

The Court ordered the proof of the debt to be under the separate commission against *Calverly Bewick*.

*Ex parte* LEE.

**T**HIS was a petition to be admitted to prove similar debts with the above, under the joint commission.

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Lincoln's Inn  
Hall, 11th August,  
Same point.

*Petition dismissed.*

## KINWORTHY v. ALLEN.

**T**HE answer was filed in *July*, 1783, and no further proceeding had in the cause. In *July*, 1784, a notice was given in the office that the Court would be moved that the bill should be dismissed: on the day for which the notice was given, the plaintiffs moved to refer the answer for impertinence. Mr. *Hollist* now moved to discharge that rule, on account of the length of time the plaintiff had lain by after the answer came in, and cited the anonymous case, 2 Ves. 631. where Lord *Hardwicke* discharged such a rule in a similar case, comparing it to the case of exceptions where they are not brought in within two terms:—but Lord *Chancellor* refused the present motion, because there is no established rule of the Court within what time an answer may be referred for impertinence: and though Lord *Hardwicke* had compared it to the case of exceptions, he had not laid down a rule upon the subject(a).

Lincoln's Inn  
Hall, 1st seal be-  
fore Michaelmas  
term, 1784.

Motion to dis-  
charge an order  
to refer an an-  
swer for imper-  
tinance, obtained  
after notice of  
motion to dismiss,  
refused.

(a) See the case in 2 Ves. cited in *Pellow v. —*, 6 Ves. 456. quod vide, and *Dixon v. Olmius*, cit. ib. and

reported 1 Cox, 412, as to waiver of reference for impertinence.

## MICHAELMAS TERM.

25 GEO. III. 1784.

ARNALD v. ARNALD.

S. C.

2 Dick. 645.

*E. M.* by will, orders her estate to be sold, and the produce to be divided: She afterwards sells the estate; this is a revocation of the will.

**T**HIS bill was filed by *Catherine Arnald*, niece and surviving residuary legatee of *Elizabeth Milner*, and administratrix of *Catherine Arnald*, her mother, another residuary legatee of *Elizabeth Milner*, against *William Arnald*, the executor of the will of *Elizabeth Milner*, (since become a lunatic), and a devisee of one-third part of the produce of the estate of *Elizabeth Milner*, *Maria Catherine Arnald*, a devisee of £200, and *Elizabeth Thompson*, the devisee of another third part of the produce of the estate of *Elizabeth Milner*, on the following case:—*Elizabeth Milner* made her will the 3d of *January*, 1769, and thereby devised a messuage in *Lancashire* to her sister *Catherine* (the plaintiff's mother, since deceased,) for life, and after her decease she devised the same to *Charles Hanchman* and *William Arnald*, to sell the same, and to apply the sum of £200 to the use of *Maria Catherine Arnald*, then to apply one-third part of the residue of the money to arise from the sale to the use of *Catherine Arnald*; one-third thereof to the use of *William Arnald*, and the interest of the other third part to the use of *Elizabeth Thompson* (mother of the defendant *Elizabeth Thompson*) for life; remainder to her children; and gave the residue to her niece *Catherine*, the plaintiff. After the making of the will, the testatrix sold the estate for £2,500, a part of the purchase-money was left upon mortgage on the estate, and the remainder was laid out in the purchase of £2,100, 3 per cent. consol. annuities.

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The 8th of *July*, 1775, she died, without revoking the will: *William Arnald* proved the will in the Ecclesiastical Court.—The plaintiff, by the bill, insists that the sale of the estate by the testatrix was a revocation of the will, and therefore that she is entitled to the purchase-money as part of the personal estate of the testatrix. The cause came on last term, but the defendant *William Arnald* having become a lunatic, and his committee not being a party, it stood over on that account. *Brook Bridges*, the committee, being now before the Court, the cause came on again.

*Mr. Attorney-General*, for the plaintiff—insisted, that the sale of the estate was a revocation of the will, even if the parties who claimed under it could ascertain that the money in the funds was the very produce of the sale.

Mr.

Mr. Madocks and Mr. Hardinge, for the defendant *William Arnald*; and Mr. Scott and Mr. Mitford, for *Maria Catherine Arnald*, the devisee of the £200 out of the produce of the estate, —on the other hand, contended, that this was not a revocation of the will, that the testatrix had only done the act herself, which at the time of making the will she intended should be done by the trustees, and although they will not take it in the form in which the testatrix then intended, they may have the substance, *Savile v. Blackett*, 1 P. W. 777.—The primary intention being that the third part of this estate intended to be sold should go to the children, it would be very hard to defeat that intention, and leave them unprovided for, as they must be in this case. They cited several cases where mortgages and dispositions for payment of debts had been held to be revocations only *pro tanto*, particularly *Vernon v. Jones*, 2 Vern. 241, also in Pr. Ch. 32, where Sir Thomas Vernon had devised lands (with exceptions), to be sold for payment of debts, and made a provision of £200 *per annum* out of the excepted lands for his wife for life; afterwards he and his wife joined in a mortgage, and levied a fine, and he executed a deed of trust to sell, for payment of debts, the surplus to him and his heirs, and it was held not to revoke the provision for the wife. To the same purpose also *Rider v. Wager*, 2 P. W. 328, where a mortgage by deed and fine was held a revocation *pro tanto* only, and *Sparrow v. Hardcastle*, 3 Atk. 798, where mortgages and conveyance for payment of debts are held not to be revocations; and although this case is not expressly within the exceptions, it may be held that these devises are equivalent to legacies of the third parts, or, at least, the counsel for *Maria Catherine* hoped her £200 might be construed so to be.

1784.

ARNALD  
v.  
ARNALD.

[ 403 ]

Lord Chancellor said, it was a difficult thing to say when a legacy shall be so clearly specific that it shall continue to be so in all events; it would be much easier to construe it to be pecuniary for the purpose of supporting it. A specific legacy is the same at law and in equity, except in this circumstance, that at law any alteration is an ademption; but not so considered here, when it is merely for a partial purpose: but in this case there is an absolute disposition made by the will, and before that can take effect, another absolute disposition, inconsistent with it, is made by the testatrix herself. His Lordship therefore decreed for the plaintiff that the will was revoked, and the plaintiff entitled as residuary legatee (a).

(a) As to the ademption of specific legacies by alteration of the property, &c. vide *Ashburner v. Macguire*, post, vol. ii. 108.

1784.

S. C.

2 Dick. 646.

Notwithstanding the common course of the Court is to give only 40s. costs upon dismissal of a suit heard on bill and answer; yet if the party be vexatious, full costs may be given.

## MANSEL v. BOWLES.

**T**HE cause was brought on upon bill and answer, and appearing to be vexatious, and the plaintiff not to have replied to the answers merely to avoid costs: The question was, Whether the Court could give full costs, or only 40s.?

*Lord Chancellor* said, *Mr. Mansfield* was accurate with respect to the order of the Court, and that in such cases the Court would not hold itself bound by the rule of 40s. costs, but would give the whole costs of the vexatious suit; and that it had been so done by *Lord Hardwicke*, 2 Atk. 288, and 3 Atk. 1.—His Lordship therefore directed the costs to be taxed upon the dismissal of this bill.

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## WHITBREAD v. BROCKHURST.

## WHITBREAD v. WAINWRIGHT.

## WHITBREAD v. PEARKES.

Plea of the statute of frauds, averring, first, that there was no contract in writing: secondly, that there had been no acts done in part-performance; over-ruled as double, and ordered to stand for an answer, with liberty to except.

**T**HESE were three pleas put in to a bill filed by the plaintiff *Whitbread*, for a specific performance of an agreement for the sale of five-twelfth parts of an estate called the *Putteridge* estate, in *Hertfordshire* and *Bedfordshire*. Upon the death of *Sir Benjamin Rawlins*, intestate, five-twelfth parts of the estate descended upon five sisters of the family of *Arnold*, to wit, *Sarah*, married to the defendant *Brockhurst*; *Rebecca Arnold*, spinster; *Ann*, married to *Robert Wainwright*; *Susannah*, wife of *Martin Pearkes*, and *Mary*, wife of *John Pearkes*. In order to sell the estate, they, by deed, dated 30th July, 1779, conveyed their shares to *Miles Penfold*, *Richard Tristram*, and *William Wiltshire*, in trust to sell, and levied fines, and authorized *Robert Wainwright* and *Martin Pearkes*, to act in the sale as their general agents. *Wainwright* and *Pearkes* employed *Thomas Skynner*, an auctioneer, to sell the estate in behalf of all parties, and the plaintiff entered into a treaty with him for the purchase, of which a memorandum was made by *Skynner*, in the following terms: “The proprietors of five-twelfths of the *Putteridge* estate agree to sell, after deducting land-tax, quit-rent, and every other out-going, for twenty-five years purchase, and out of that amount to be deducted the value of the tithes, which amount to about £140 for each share, the timber to be valued by two persons, or their umpire.” This memorandum *Mr. Skynner* sent to the plaintiff, inclosed in the following



following note: "Mr. Skynner's compliments to Mr. *Whitbread*,  
 "informs him that Mr. *Wainwright* and Mr. *Pearkes*, on behalf  
 "of themselves and the rest of the family of *Arnold*, have fixed  
 "on Mr. *Marxwell*, of *Grevely*, to value the timber and tithes for  
 "them, and wishes Mr. *Whitbread* would appoint a time and per-  
 "son to do the same, which Mr. *Skynner* has promised Mr. *Whit-*  
 "*bread* would fix in a few days. *December 3d, 1782.*" On the  
 2d of *December*, *Wainwright*, with the privity of the other parties,  
 wrote a letter to *Tristram* and *Wiltshire*, two of the trustees, as  
 follows: "Mr. *Skynner* has agreed to purchase the five shares of  
 "the *Putteridge* estate belonging to the *Arnold* family, and desires  
 "an abstract of the title may be sent him, and also to have an exact  
 "account of the out-goings to which the estate is subject, except  
 "tithes, and to be informed of the names of all the tenants, and  
 "what rent each pays. I have therefore herewith sent you the old  
 "abstract found among Sir *Benjamin Rawlins's* writings, together  
 "with a copy of the deed of the 30th *July, 1779*, and must beg  
 "you to perfect the abstract, and to send a copy, with the account  
 "and information mentioned above, to Mr. *Skynner*, as speedily as  
 "possible, and to take the conduct of the business as attornies for  
 "the vendors, with whose concurrence this letter is wrote, by  
 "your's, &c. ROBERT WAINWRIGHT." The trustees sent the  
 abstract to the plaintiff; the surveyors met to value the timber, and  
 appointed an umpire, who made a valuation thereof.—The plaintiff's  
 bill stated these facts, and insisted upon the several acts done as be-  
 ing a part-performance of the agreement, and further stated that he  
 had, since the beginning of the treaty, kept a sum equivalent to the  
 purchase-money, 8 or £9,000 dead in a banker's hands, in order to  
 complete the purchase. The defendants put in three several pleas;  
 the first was put in by defendants *Wainwright, Martin Pearkes*,  
 and *Susannah* his wife, by which they, as to so much of the bill  
 as sought from them a discovery of any contract or agreement for  
 the purchase of the five shares, &c. *not in writing*, signed by de-  
 fendants, or any person by them lawfully authorized, and as to so  
 much of the bill as prayed such contract might be specifically per-  
 formed, pleaded the statute of the 29 *Charles 2*, for preventing of  
 frauds and perjuries, reciting the clause whereby no action is to be  
 brought "upon any contract or sale of any lands, tenements, or  
 "hereditaments, or any interest in or concerning them, unless the  
 "agreement upon which such action shall be brought, or some  
 "memorandum or note thereof shall be in writing, and signed by  
 "the party to be charged therewith, or some other person thereunto  
 "by him lawfully authorized." The defendants averred, "that no  
 "contract or agreement for the sale of the said shares of the said  
 "estate, or of any share or interest therein, to or for the benefit of  
 "the plaintiff, or any other person, nor any memorandum or note  
 "of any such agreement, was in writing signed by the defendants,  
 "or any other person, by defendants thereunto lawfully authorized,  
 "within

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“within the meaning of the statute.” They also averred, that “no matter or thing whatsoever had been done toward performance of such agreement, as by plaintiff pretended to have been made, unless the acts after-mentioned can be construed as a part performance of such agreement.” They there admit the appointment of surveyors, and that they met; the abstract of the title being sent; and the letter of *Wainwright*: “which acts, defendants are advised, and submit to the judgment of the Court, are not acts which ought to be deemed a part performance of the agreement alledged by the bill to have been made.” The defendants, by their answer, denied any authority given to them by the other parties, or by them to *Skynner*, to sell or dispose of their interests in the said shares.—The pleas of the other defendants were the same, except that in the averment of no acts having been done in part-performance, they did not except the acts specified in the plea of *Wainwright*.

Mr. *Ambler*, in support of the pleas,—stated the prayer of the bill, and the several transactions, and said there were two defects in the agreement, which rendered it null under the statute. First, There was no memorandum signed by the party. Second, *Skynner* had no authority from them, and even if he had, he has not signed the agreement. If there has been no such memorandum in writing as the statute requires, the plea is proper as to the discovery; for an agreement not within the statute cannot be enforced. It is true, that if by his answer the defendant admits the agreement, that admission takes it out of the statute; for there is no longer any danger of perjury, so that the Court may then carry the agreement into execution.—Therefore a plea of the statute to a bill for the discovery of an agreement not in writing is proper. Then as to the plea to relief: The agreement or memorandum drawn up by *Skynner* is not within the statute; there is no agreement signed or put in writing by a person having sufficient authority. Then if the plea be such as to destroy the agreement, are the facts stated as part-performance sufficient to support it? Mr. *Wainwright*’s plea excepts three acts, the valuation of the timber, the sending the abstract, and his letter to the trustees.—These are acts very proper to be met by a plea, for your Lordship can judge as well of them in this manner, as at the hearing of the cause.—These acts cannot amount to a part-performance: acts for that purpose must be such as *will be prejudicial to the party doing them*, if the agreement is not carried into execution. This was laid down in *Gunter v. Horsely*, in *Trinity Term*, 1776. They must be acts also with the manifest intention of being in part-performance. *Foxcroft v. Lister*, cited 2 Vern. 456: they must be acts like those in that case, which could not be done with any other intent; part of the house was pulled down, and a new part built: but the mere delivering of an abstract, the meeting of parties, or valuing timber, which  
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are acts merely preparatory to a sale, cannot be such acts. This appears from *Hawkins v. Holmes*, 1 P. W. 770, citing that of *Ithel v. Potter*. It appears the act must be a material act.—The acts done here would not be prejudicial to the plaintiff, if the agreement was not carried into execution.

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Mr. Selwyn (on the same side).—It is taken for granted in the bill, that *Pearkes* and *Wainwright*, who had themselves only two-fifth parts, were authorized by the other parties, and that *Skynner* had a proper authority; but neither of these appears upon the whole case, and if they did, still it would be necessary under the statutes that the person having authority should sign the agreement. The objection to the plea is, that they do not meet the case made by the bill, *that* charging an agreement in writing, though not signed, yet drawn up by a person having proper authority, and the pleas being to the discovery of an agreement *not in writing*. But this method of pleading the statute must be right, otherwise the plaintiff would in all cases be sure of a decree; for by charging in his bill a case out of the statute, the defendant would be obliged to answer, and the admission in the answer would bring the case within the authority of *Croyston v. Banes*, Pr. Ch. 208, and *Symondson v. Tweed*, Pr. Ch. 374. But this plea has been held to be good, even when there has been a part-performance. *Hollis v. Whiting*, 1 Vern. 151.—*Samson v. Butler*. And if these cases should not be allowed to be law, yet the plaintiff here has failed in a very material point: he has stated no one act which could be a part-performance.—Acts carried much farther than these have been held insufficient, *Seagood v. Meale and Leonard*, Pre. Ch. 560.

Mr. Mitford (on the same side).—It is necessary to consider the statute with accuracy: it has several clauses, and confusion arises from not distinguishing the cases as they fall under the different clauses. The first clause relates to the creation of estates; the third to the surrender, assignment, or grant of *existing* estates; the fourth (on which the present question arises) takes away the right of action upon a contract for lands, unless it shall be reduced into writing in the manner therein required. The seventeenth clause relates to the sale of goods. The cases on the statute have referred to five different clauses; the first makes the estates therein mentioned only estates at will.—The first case upon it is *Hollis v. Whiting*, 1 Vern. 151; that was upon the creation of an estate by the grant of a lease. There possession was a necessary ingredient in the case, for otherwise the estate could not have been created by parol.—This distinguishes the cases upon this clause from the others. The difficulty there was, whether the agreement was void, the estate being so. In *Hollis v. Edwards*, 1 Vern. 159, the agreement was, that the contract should be reduced into writing, and it was sent to law to obtain damages for not having reduced it into writing.

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writing. On the third clause no doubt has arisen, and there is no case. On the fourth the principal questions have arisen. There is a difference between it and the first. The first requires the agent to be authorized by writing, which this clause doth not. We are to contend there is no agreement in this case properly entered into under the statute. *Skynner* is sworn by the answer to be the agent of the plaintiff, not of the defendants; if he was the agent of the defendants, here is no agreement signed by him. In the letter to the trustees, *Wainwright* says, "Mr. *Skynner* has agreed;" this seems to imply that *Skynner* was the agent of the plaintiff, rather than of the *Arnold* family, and the whole shews that no precise contract was then made, but that all was preparatory to a subsequent treaty.—The case therefore cannot be supported, unless Mr. *Whitbread* can shew subsequent acts to have been done amounting to a part-performance of the agreement. Courts of equity have in some cases decreed a specific performance of parol agreements, but the only ground upon which they have so decreed has been upon fraud. The first case was before Lord *Nottingham*: it was an agreement for the execution of an absolute conveyance, and a defeasance, the conveyance being executed, the other party refused to execute the defeasance. There one thing was obtained where another was intended, and that being a species of fraud, the Court relieved. Some other cases followed on the same ground, among the rest Sir *George Maxwell's* case. So where the execution of the agreement is prevented by fraud, as was the case in *Forcraft v. Lister*, in Gilbert's Reports. That was followed by several cases, all of the same nature, that there is some circumstance which makes the refusal to execute the agreement fraudulent. The case 2 Ch. Ca. 135. is taken to shew that payment of money is a part-performance; but that case applies to the seventeenth clause of the statute, not to the fourth. But in this case none of the acts amount to a part-performance; there is no one of them so material as to be prejudicial to the plaintiff if the agreement is not performed. Even in cases where possession has been delivered, it must appear to have been so unequivocally, and as a part-performance, otherwise it is not sufficient. Where the intention of the act has been equivocal it has never been held as part-performance; this appears from *Hollis v. Whiting*, and in several of the other cases in 1 Vern. and more particularly from that of *Cole v. White*, before Lord *Camden* in 1767, where there was an agreement for a lease for four years, and the bill charged that possession was given; defendant pleaded the statute, and by his answer denied that possession was delivered in part-performance and swore that the plaintiff obtained it wrongfully. The plea was allowed, and Lord *Camden* said, that the giving instructions for a lease could not make part of the case as a part-performance. Upon the whole, I contend that the acts here stated cannot be sufficient as a part-performance.

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*Lord Chancellor.*—The plea in this case is very peculiar; perhaps it would have been better to have demurred, for though the course of the Court has been to admit these pleas of the statute, I do not see the reason of it, as it is a public statute. As to the averment, I doubt whether the plea can traverse the facts in the bill. The other question is new; I doubt whether the two facts of there being no agreement in writing, and of there being no act done in part-performance, can be joined in the same plea, without making it multifarious, and if it is so, it cannot be pleaded. But, in the first place, I have great doubt whether you can put a negative on the bill, or your averments must not be collateral to the bill.

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*Mr. Selwyn.*—In pleas of the statute of limitations that is frequently done; if the bill states that the cause of suit arose in that or the former year, the plea of the statute, with an averment that it did not arise within six years, contradicts the allegation of the bill.

*Lord Chancellor.*—I doubt that case to have ever been determined, and I am not satisfied with the principle of it.

*Mr. Mansfield*, for the plaintiff.—The only question now before the Court is, whether the plea as pleaded can be supported. The merits are, for the present, out of the case; all the pleas go to a parol agreement, though no parol agreement was stated in the bill. Then the question is, whether the agreement was reduced into writing by a person authorized so to do. *Skynner* was authorized by *Wainwright* and *Pearkes*, whose wives were entitled to two of the twelfth-parts, and the agreement is in the terms of "The proprietors of five-twelfths, &c." Then it is said, this is not an agreement signed. Why not? It could not be disputed, that if a man wrote an agreement himself, "*A. B. agrees to sell*," it would be sufficient. This is decided in the case of a will, that the testator putting his own name at the commencement, is equivalent to his signing it, yet the statutes there expressly require signing. Then instead of the parties themselves writing the agreement it is written by *Skynner*, as their agent, he calls them "the proprietors, &c." which is just as well as if he had enumerated their names. *Seagood v. Meale*, is a very different case from this, there the note did not specify the price or other circumstances of the bargain. Here it is to sell, after certain deductions, at 25 years purchase; so that in this case there is no uncertainty. Then the valuation of the timber is certainly a very material act, and attended with a considerable expence to the plaintiff. *Wainwright's* letter, though perhaps not strictly a part-performance, affords strong evidence that he had entered into an agreement, the language is that of a man who has made a contract. These are the material circumstances on which



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the bill is founded, and the only question at present is whether the plea is well pleaded, and upon that head it appears to be perfectly anomalous, it does not meet any allegation of the bill. It is properly a plea of no agreement in writing, for it cannot be a plea of a public law. But the bill did not go upon a parol agreement, but expressly on the ground that the contract had been reduced into writing. The plea of *Wainwright* and *Pearkes* is partly a plea, and partly a demurrer, for it admits facts and submits the effect of them to the Court; it denies facts alledged, and then goes on to say that no acts were done, save such and such. A plea, in order to be good, must be capable of being replied to, and of going to issue, but it is impossible to reply to, or take an issue upon the facts stated in this plea; but they desire your Lordship's opinion upon these facts.—This is more like a demurrer than a plea.—The other pleas, though not open to this objection, are also exceptionable on other grounds.—They are double pleas. First, That there was no agreement in writing; secondly, that no act was done in part-performance: whereas the office of a plea is to state some single fact by which the plaintiff is estopped from going into the enquiry made by his bill. This is of itself a sufficient objection to the pleas. I remember a plea over-ruled by your Lordship on that ground alone.—The plea therefore ought to be over-ruled, which will be no injustice to the parties; the defendants will be obliged to discover the letters, and the merits will be easily decided.

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Mr. *Madocks*, on the same side.—*Wainwright's* plea seems to be open to this objection, That it does not tend to put an end to the suit, for the averment being that no act has been done in part-performance, if the plea be replied to and put in issue, it remains to be decided what the effect of those acts will be: with respect to the others, the question is, whether they are not matters of answer rather than plea. If a man states in his bill a contract generally, and the defendant pleads the statute, and no contract in writing, this plea is inconsistent with the bill, which only stated a contract generally. The office of a plea is to confess and avoid, it therefore must take the facts in the bill to be true; but if the bill states the contract to be in writing, and the bill is false in so stating it, that is not matter of plea, but of answer; and if he by answer denies generally that there was an agreement in writing, it is no matter of exception that he has not denied a parol agreement. Now in this case it is expressly stated in the bill, first, that there was a contract in writing; secondly, that acts were done in part-performance of that agreement. The plea is, that there was no contract in writing, and that no acts were done in part-performance. This is an answer, not a plea: it is direct denial of the case made by the bill. The bill states, that *Pearkes* and *Wainwright* were authorized by the other proprietors to act for them, and that *Skynner* was appointed by them to treat for the sale, and that he committed the agreement



reement to writing, and insists that these acts put together, amount to an agreement in writing signed by a person duly authorized. This fact the plea denies, which denial is certainly matter of answer, not of plea. The other point arises upon the part-performance, the bill states the employment of the surveyors to value the timber, which is certainly a very material act, as by it the plaintiff incurred a considerable expence.

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*Lord Chancellor.*—I do not recollect any case where an act merely introductory or ancillary to the agreement, though attended with expence, has been held a part-performance.

*Mr. Madocks.*—I believe there is not any such case, but it strongly fortifies the fact of there having been an agreement. Here the plea being to an agreement not signed, is contrary to the very position of the bill. It brings no new fact in issue.—A plea cannot bring the law in issue.—The question to be decided is, whether *Vainwright's* letter amounts to an agreement in point of law, this is the office of an answer, from whence the question will arise at the hearing of the cause.—The forms of the statute have in many cases not been insisted upon, so as the substance has been complied with. So if a person sign a writing referring to another writing, which contains the explicit terms of the agreement, this has been held to be equally good as if the whole were in one paper and signed. And the question in this case will be, whether, there being an agreement in writing, the statute has not been substantially complied with. On the whole, I argue that these pleas contain matter of answer, not of plea, and ought to stand for an answer.

*Mr. Scott*, on the same side.—When once the Court laid it down that a part-performance shall take the case out of the statute, it seems to have been impossible to plead the statute to a bill which charged facts of part-performance. For, supposing issue to be taken upon such a plea, and every fact in the plea found to be untrue, still no parol agreement would be found, upon which the whole case must be grounded, and your Lordship, though you should think the facts sufficient to take the case out of the statute, could not give the relief.—This is inconsistent with the nature of a plea, which must be conclusive upon the matter in controversy. But I deny it to be a general rule that the defendant's admission of a parol agreement shall take the case out of the statute; for though he admits the agreement, yet by pleading the statute, he avoids it; and by his insisting in his answer on the statute, he shall have the same advantage as upon a plea. This appears from 1 Eq. Ab. 19, pl. 3. *Croyston v. Banes*, Pr. Ch. 208. and Lord Camden's opinion in *Cole v. White*: though I admit in one case, *Symondson v. Tweed*, Pr. Ch. 374. and Gilb. 35. the distinction of insisting or not upon the statute, is not taken.

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Mr. *Wooddeson*, on the same side, cited 2 Freem. 268. 281. 5 Vin. Abr. 522. 523. 9 Mod. 37. as cases contradicting the authority of *Hollis v. Whiting*.

*Lord Chancellor*.—Before Mr. *Ambler* replies I wish him to consider what will be the effect of a judgment upon these pleas; they point at the relief and at the discovery, but to this last only, as leading to the relief, and they apply only to a *parol* agreement, which the bill does not state; the judgment, therefore, could only be a declaration that it is either a written agreement or not.—Then it must be considered how far the Court can entertain (i) a double plea, saying both that there was no agreement in writing, and that there was no part-performance, and how you would introduce such a plea to a bill, which rests upon the part execution.—It has been suggested with great clearness by Mr. *Mitford*, that the Court has decided cases of part-performance on the ground of a fraud upon the person performing, not that the agreement was not originally within the contemplation of the statute.—But yet on the other side of the hall they have decided, on great argument, that an agreement partly performed was not within the original conception of the statute. The argument will be, that the plea must meet both the original agreement and the part-performance.—I do not mean to declare immediately that such a plea cannot be, but it strikes me as a new plea. In the next place it will be necessary to consider what part of the bill you have not answered to, for if the whole is answered, that is a waiver of the plea; and upon looking into the answer it seems as if the whole was answered. There are several other matters also to be considered: First, whether the use of a plea and an answer, under the statute 29 Ch. 2. be to deny the transaction, and whether, if the party admits the transaction, he can nevertheless be permitted to take the benefit of the statute. If he only admits the circumstances of the case, and not a direct agreement, I see no reason why he should not bind the Court as much as by refusing to answer. It is in reference to the application of the plea in other cases that I say these questions should be discussed, not for the sake of the present case, in which I must go so far as to say I am sorry the merits are not before me.

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Mr. *Ambler*, in reply.—I conceive a plea in bar to be where the defendant makes an averment of a fact not appearing upon the face of the plaintiff's bill, which if true, puts an end to the plaintiff's claim: and in this it differs from a demurrer, which shews, from matter upon the face of the bill, that the plaintiff is not entitled to the relief prayed. All matters which will make a defence, it is true, cannot be pleaded, for a plea must not be crouded with a variety of matters; if it is, it puts an end to the plea, because

(i) Vide 1 P. W. 766.

it no longer answers the end of a plea, which is to save time, expence, and vexation, by bringing the cause to a short conclusion. But where it comes to a short fact, then it is proper in the shape of a plea, such as the plea of a deed, by which the plaintiff appears to be only tenant for life to a bill grounded on his being tenant in tail. So a plea of the statute of limitations, which puts an end to the demand. And it is not necessary that it should be one simple fact, for if it consists of two or three facts tending to the effect it is equally good, as in the case of *Harrison v. Southcote*, 1 Atk. 528. It is sufficient that the facts pleaded are consistent.—In this case the pleas go both to the discovery and to the relief. With regard to the discovery, two objections are taken to the pleas; first, on the merits, that there ought to be a discovery; secondly, on the form, that they are ill pleaded.—With respect to the discovery it was proper to plead; for if a discovery was obtained, though of an agreement not warranted by the statute, the Court would have decreed a performance.—This is established by the cases cited before of *Croyston v. Banes*, and *Symondson v. Tweed*, in Pr. Ch. and also by that of *Wanley v. Sawbridge*, in the Exchequer, in *Easter Term*, 4 Geo. 2.—Then as to the form of the plea, one objection taken is, that it is pleaded to the discovery of an agreement *not in writing*, whereas the bill states a contract *in writing*. But upon looking into the bill it appears the defendants are interrogated to the contract in writing, and to *any other contract* entered into by them, which justifies the plea.—Then as to the objection to the plea to the relief; it is argued two ways: first, that the statute could not be pleaded to this bill; second, that the averments are wrongly made. The case of *Hawkins v. Holmes*, in 1 P. W. seems much in point, and it is observable that the fourth clause of the statute bars the remedy only, it does not nullify the contract; therefore, unless the defendant pleads the statute, the Court will decree performance, and then I think they were proper in pleading it. Then, as to what has been said as to the facts alleged in the bill to have been done in part-performance; where a defendant pleads this act, he must shew his plea to be good, by clearing the case of any fact which would take it out of the statutes. This makes the averments a necessary part of the plea, the facts must either be pleaded to or denied, and this is done here. They have stated in the bill three particular acts done in part-performance. The defendants have admitted the facts and avoided them, and said that they are not acts amounting to a part-performance. Suppose the pleas to be over-ruled and the cause to come to a hearing, the plaintiff could go into no proof, they would read the admission from the plea; the question therefore is ripe for the Court's opinion, which is strictly the office of a plea.—They then object that this is a double plea: I admit a double plea is bad, but this is no double plea; a double plea is not where different matters but inconsistent matters are pleaded: for instance, a man cannot plead

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plead that he is a purchaser without notice, and go on to say, that if he is not a purchaser, he is a mortgagee with twenty years possession; but in these pleas there is no inconsistency. This brings me to consider the acts alledged to be done in part-performance. *Hawkins v. Holmes*, and *Seagood v. Meale*, both shew that the acts done must be material acts: payment of a sum of money, or the mere delivery of possession are not sufficient acts. All the cases shew that the act must be a *material act*, done *in pursuance* of the contract, and such as will *be detrimental* to the party doing it, if the contract be not carried into execution. Here the acts are not so strong as in the cases, and are in fact merely preparatory matters. If the facts alledged to be done in part-performance of an agreement are denied, it is immaterial whether such denial be by a plea or by an answer.—3 P. W. 244, (in the note) denial of notice may either be by the plea or by answer.

*Lord Chancellor.*—A very serious difficulty seems to me to arise from the different cases upon this fourth clause of the statute, which declares that no action shall be sustained upon any contract or sale of lands unless the agreement shall be in writing, and attended with the forms therein required. This Court has adopted the provision of the statute so far, as to admit it to be pleaded to bills for the specific performance of such agreements; yet in fact the Court has in one case admitted this plea, and in another has said that if the defendant will admit the agreement by answer, the action shall be sustained, and this tends to a more palpable consequence when the plaintiff by his bill charges the ulterior circumstances as part execution of the contract; for I do not at present see any means of delivering the defendant from answering; and then to say that the action shall be sustained, at the same time that the statute expressly says it shall not be sustained, seems to imply a manifest contradiction. It should rather seem, that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say that the statute should be a bar to the plaintiff's claim. If, on the other hand, it is roundly asserted that the statute does not apply to an agreement, which the defendant is ready to admit, the length of that principle will be, that the defendant shall be obliged to declare whether there was such an agreement, and it will be like all other cases, the defendant must assist the Court with the discovery.—This point seems, from Lord *Camden's* opinion in *Cole v. White*, to have struck him much in the same manner; but as the matter appears upon the case, I take it if the defendant confesses an agreement short of the whole, and any thing is left to proof, the Court would say that, so far as it is left to proof, the plaintiff shall not proceed.—Another considerable difficulty has arisen with respect to the effect of a part execution. There certainly are cases which have considered an agreement which has  
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been partly executed as never having been within the original view of the statute; and this has been a ground to induce the Court of King's Bench, as I am told, to determine this case to be entirely out of the statute. I acknowledge I always thought the Court considered it as fraudulent in the party to make the contract, and to lead on the other party to lay out his money in the melioration of the estate, and then to withdraw from the performance of the contract. Indeed, whether the money has been well or ill laid out is indifferent, the fraud is the same. At the same time it must be acknowledged, that this case is treated in the books as being out of the statute (*a*). These points deserve a great deal of consideration, as applying to other cases, but they do not seem to apply particularly to this case; nor do I think I can go into the merits of the case in determining upon the form of a plea (*b*). The question before me is, whether it is possible to put together, in one plea, all that is put together in this case.—Mr. *Ambler* argues it on this ground; that although it is necessary the plea should bring the matter to a single point, yet it is not necessary it should be to a single fact, so as the facts are consistent. This is not my idea, I think no facts can be averred unless they conduce to the one single point, when forty conveyances may conduce to one title. So in the *Papist's* case before Lord *Hardwicke* (*c*), every point which went to the incapacity might be pleaded. But here are two points; first, that there is no agreement in writing, and this by itself is an admitted bar; but secondly, it goes on that no act has been done in part execution, which is a totally distinct fact. Whether you consider it, as the Court of King's Bench have done, as an agreement totally out of the statute, or with the court of equity, as matter of fraud, they are two pleas applying to cases of different natures; distinct, not only in the form of the plea, but in the justice to be applied to them. I determine it therefore on the ground of its containing two different and distinct points, and the reason the Court does not admit such pleas is, that you may put all the different circumstances together in your answer, which you cannot do at common law; therefore there is not the same reason for pleading double; but the use of a plea here is to save time, expence, and vexation; therefore, if one point will put an end to the whole cause, it is important to the administration of justice that it should be pleaded; but if you are to state many matters, the answer is the more commodious form to do it in. If it is asked why you may not bring two facts into a plea, the answer is, that convenience does not require it; and the argument must go to three or to twenty

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(*a*) As to the doctrine upon the subject of part performance of parol agreement, vide *Whitchurch v. Beris*, post, vol. ii. 559. and the Editor's note to it.

(*b*) There is a much better report of

the remainder of the judgment from a note of Sir *Samuel Ramilly*, 2 *Ves. & Bea.* 153. n.

(*c*) *Harrison v. Southcote*, 1 *Atk.* 528.

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facts. In fact it would tend to the very delay the policy of justice has meant to prevent, by admitting of a plea.—The plea therefore must stand for an answer, with liberty to except (a).

(a) Upon the subject of duplicity in pleading, vide *Nobkissen v. Hastings*, post, vol. iv. 252. *S. C.* 2 Ves. jun. 84. *Corporation of London v. Corporation of Liverpool*, 3 Anstr. 738. *Ritchie v. Aylmer*, 15 Ves. 79. *Wood v. Strickland*, 2 Ves. & Bea. 150. *Beames Elements*

of Pleas in Equity, 10. et seq. The mere surplusage will not vitiate a plea in this respect, *Claridge v. Hoare*, 14 Ves. 65. over-ruling *Beachcroft v. Beachcroft*, cit. ib. As to amending pleas, vide *Newman v. Wallis*, post, vol. ii. 143. and the Editor's note to it.

SLOMAN v. WALTER.

Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus*, to try the real damage.

UPON shewing cause why an injunction should not be dissolved, the case appeared to be thus : That the plaintiff and defendant were partners in the Chapter coffee-house, and upon entering into the partnership it had been agreed that the business should be conducted entirely by the plaintiff, but that the defendant should have the use of a particular room in the house whenever he thought proper. And, in order to enforce this agreement, a bond was entered into by the plaintiff to the defendant in the penalty of £500. After some time the defendant demanded the use of the room, and being refused, brought an action for the penalty of the bond. Plaintiff filed this bill, praying an issue to try *quantum damnificatus*, and an injunction in the meanwhile.—He obtained an injunction till answer or further order; and the answer being now come in, the only question, in respect to continuing the injunction till the hearing, was whether the penalty of the bond was merely intended as a security for the enjoyment of the room, or in the nature of assessed damages between the parties.

Mr. Scott and Mr. Harvey, for the defendant,—contended the injunction ought to be dissolved, and the defendant permitted to have his remedy upon the bond. It was impossible a jury, upon an issue of *quantum damnificatus*, could assess any other damages than those already assessed by the parties themselves.—They referred to the case in the House of Lords, where £5 per acre penalty for plowing up meadow-land was reserved in a lease, and the Court of Chancery having relieved against the penalty, and directed an issue to try the actual damage, the decree was reversed, (*Rolfe v. Peterson*, 6 Bro. P. C. 470.) and also cited 2 Atk. 190.—*Roy v. the Duke of Beaufort*, and Ch. Ca. 183.

Lord Chancellor said, the only question was,—whether this was to be considered as a penalty or as assessed damages. The rule that



that where a penalty is inserted, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessorial, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken. This case is to be considered in that light.—The injunction must be continued till the hearing \* (a).

\* The same had been done by the late Lords Commissioners, in a case of *Hardy v. Martin*, 7th of May, 1783 (b), where plaintiff and defendant had been partners as brandy-merchants; on plaintiff's quitting the business, and selling the lease and good-will of the shop to defendant for £300, he entered into bond in £600 penalty not to sell for 19 years, any quantity of brandy less than six gallons, within the cities of *London* and *Westminster*, or five miles thereof, or to permit any person so to do in his name, &c. Upon a breach action brought, and a verdict for the penalty, plaintiff filed this bill, praying that an account might be taken of the actual damage sustained by defendant, and an issue directed for that purpose; and that, on payment of the damages, defendant might be restrained from taking out execution, for the penalty of the bond.—Upon motion to dissolve the injunction, and cause shewn, the injunction was continued and an issue directed, when the jury gave a verdict for the plaintiffs at law, (defendants in this Court), with 1s. damages.

(a) In the following cases the sum secured has been considered in the nature of liquidated damages. *Ponsonby v. Adams*, 6 Bro. P. C. 417. Ed. Toml. vol. ii. 431. *Rolfe v. Peterson*, cit. sup. *Lowe v. Peers*, 4 Burr. 2229. *Fletcher v. Dyche*, 2 T. R. 52. and *semble*, *Cock v. Richards*, 10 Ves. 429. In the two cases above reported, and in *Astley v. Weldon*, 2 Bos. & Pul. 346. *Smith v. Dickenson*, 3 Bos. & Pul. 630. *Harrison v. Wright*, 13 East, 343. it has been considered as in the nature of a penalty: in which case the remedy for a breach is an action, or issue *quantum damnificatus*, and an injunction against proceeding under a judgment for the consideration. *Shackle v. Baker*, 14 Ves. 468. In *Astley v. Weldon*, though it was remarked to be very difficult to lay down any general principle upon these cases, it was admitted to be clear, that if a certain damage less than the sum is made

payable upon the face of the same instrument, it should then be construed to be a penalty; that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. Lord *Eldon* also reprobated the principle stated in several cases, that if the sum would be very enormous as liquidated damages, it should be taken to be a penalty, though agreed to be paid in the form of a contract.

(b) This case has been since reported, 1 Cox, 26. Lord *Eldon*, in *Astley v. Weldon*, 2 Bos. & Pul. 352. expressed some doubts as to the correctness of the decision, and Mr. Justice *Chambre*, who had been counsel in it, observed, that Lord *Mansfield*, upon the trial, had been inclined to think it a case of liquidated damages.

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## Earl VERNEY v. MACNAMARA.

An answer shall not be amended after an indictment for perjury preferred or threatened, in order to avoid the indictment.

UPON a motion to amend a schedule to the defendant's answer, an indictment for perjury having been preferred, or at least threatened, *Lord Chancellor* refused to interfere, although he took it to be clear that the defendant did not intend to perjure himself, as he had no interest in so doing. That question would be proper before the grand jury, who, if they thought the defendant did not intend to perjure himself, would throw out the indictment; on the other hand, if there were ground for the indictment, it would be wrong for him to interpose (a).

*Motion denied\*.*

\* The Reporter has been informed that a similar application had been rejected a few days before, in the case of *Vaux v. Lord Waltham*, where, however, the *Lord Chancellor* seemed inclined to grant the motion, if the affidavit had clearly shewn it to be a mistake.

(a) A great number of instances of permitting and refusing amendment by way of *supplemental answer*, (amendment of the original answer being now never permitted), are collected and arranged in a note to the case of *Live-*

*sey v. Wilson*, 1 Ves. & Bea. 150. Vide also *Tenant v. Wilmore*, 2 Anstr. 368. *Moggridge v. Hodgson*, ib. 443. *Harris v. Daubeny*, 3 Anstr. 717. *Strange v. Collins*, 2 Ves. & Bea. 163. *Edwards v. M'Leay*, ib. 256.

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## HILARY TERM.

25 GEO. III. 1785.

In Court, Easter, 1785, before *Lord Loughborough*, *Ashurst*, and *Holham*, Lords Commissioners, 15th May, 1784,—29th January, 1785, before *Lord Thurlow*.

Where, upon a sale of lands, bonds are taken for the purchase money, which are not paid, *quere* whether the vendor has a lien upon the lands.

Where the material issue is found for the party who sets down the cause for further directions, he must have his costs at law.

BLACKBURN and another, Assignees of SARAH CLAYTON, & Bankrupt v. GREGSON and another, Assignees of THOMAS CASE, a Bankrupt (a).

SARAH CLAYTON, being seised in fee, (subject to mortgages to a great amount) of large coat estates, and being much embarrassed in her circumstances, determined to sell the estates, and entered into contracts with *Thomas Case* for that purpose, and the purchase money was settled at £30,000. The 23d May, 1774, she conveyed the estates, in consideration of his paying off mortgages to the amount of £12,000, and the clear sum of £17,800 to her, at instalments, for which three bonds, one for £12,000, one for £4,000, and one for £1,000, were given.—*Case* had been an agent on the estate; he entered into possession, did

(a) This case is much more fully reported, 1 Cox, 90.

acts

acts of ownership, and paid a considerable part of the mortgages, and also so much of the purchase money, secured by the bonds, as to reduce the debt to £1,400. He made a grant of an annuity of £1,000 *per annum* to — *Morrice*.— Afterwards both he and Mrs. *Clayton* became bankrupts; and this bill was filed by Mrs. *Clayton*'s assignees, against those of *Case*, to set aside the purchase as fraudulent; or contending, at least, that the bonds not having been paid, they, as representing Mrs. *Clayton*, had a lien upon the estates to the amount of the purchase-money.

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Mr. *Kenyon*, for the plaintiffs.—The vendor not having received the money for the purchase has an equitable lien upon the estate as against the vendee; though not against a purchaser under him without notice. *Chapman v. Tanner*, 1 Vern. 267, where the land was held to stand charged as against the assignees of a bankrupt. *Pollexfen v. Moore*, 3 Atk. 273, a lien for the unpaid residue of purchase-money. *Walker v. Prestwick*, 2 Ves. 622, where, though the principal case was of a ship, in arguing, it was said that in case of a conveyance of land *that* might be resorted to.— If Lord *Hardwicke*'s doctrine be right, the conclusion will be with the assignees, that they will have a lien on the estate for the remainder of the purchase-money.—There is no question with the mortgagees but who is entitled, subject to their claims; but, upon the rent-charge to *Morrice*, there is a question, whether *Case* was not a bankrupt. The conveyance was in 1777, *Case* became bankrupt in 1778; but if the conveyance was fraudulent it was an act of bankruptcy.

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Lord *Loughborough*.—I have a decided remembrance of a case, where it was held a lien continued although a bond was given.

Mr. *Mansfield*, for the defendants.—When the vendor takes a personal security, the lien does not remain, because the vendee appears to all the world as owner of the estate. Where indeed no personal security is given some of the cases seem to shew that there is a lien, but it is not determined in *Chapman v. Tanner*. It has been said, in a subsequent case, the vendor had not parted with the deeds.—*Pollexfen v. Moore* makes Lord *Hardwicke* speak strange language, and make as strange a decree.—In *Bond v. Kent*, 2 Vern. 281, it was held the seller had no lien for the sum for which a note was taken.—In \**Fowel v. Heelis*, 14th of June,

\* *Fowel v. Heelis* (a) was as follows:—Plaintiff and her son were joint-tenants of the manor of Great Ormside and other lands. By lease and release, dated

(a) S. C. 11 Serjt. *Hill's MSS.* 9. 13; and 13, ib. 372. S. C. Amb. 724.

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*June*, 1778, where the vendor had given up the deeds, and had taken bonds, it was held she had no lien.

Mr. *Spranger*, on the same side.—It is not in the power of the Court now to vary the contract. If Mrs. *Clayton* was now alive, and filed her bill, the Court could not relieve her, as she knew she was taking a personal security.

Mr. *Kenyon*, in reply.—There was a case of this kind before Lord *Camden*, from *Westmoreland*.

Lord *Loughborough*.—It was *Powel v. Brockway*.—I think it was the estate of the wife who conveyed to the husband, and he gave a bond.—The estate descended to the son, who became a bankrupt.

Mr. *Kenyon*.—In this case, if a mortgage had been executed by *Case* to Mrs. *Clayton*, it would have been a lien: in point of secresy that would have been just the same as the money being unpaid.—Here the vendee desires to hold the estate, although the money is not paid for it; can such a doctrine hold in a court of conscience, or in the mind of any moral man? There are three cases one way, that this is a lien.

Mr. *Scott*, (who had not been heard before) on the same side,—said, if no money had been paid, or security taken, the vendee would have been a trustee for the vendor, and there seems no great difference where a part only is paid.—In one case there is a great difference between part of the money being paid, and the whole secured, that in a bill filed for a discovery the party cannot protect himself by a plea of being a purchaser for valuable consideration from only having secured the money, but he must actually have paid it.

the and *July*, 1768, between plaintiff of the first part, and *James Fowel* (the son) of the second part, plaintiff, in consideration of £1,000, and natural love and affection, released all her moiety of the estate to her son in fee. Plaintiff accepted two bonds for the consideration-money, one conditioned to pay £800, the other to pay an annuity of £20 a year to *Joseph Fowel*, for the use of the plaintiff for her life.—*James Fowel* in 1770 being considerably indebted, conveyed this estate to *Thomas Heelis* and others (the defendants) in trust to sell, and pay the money to his creditors. Plaintiff received only £280 in part of her consideration-money secured by the bonds.—The bill prayed against the trustees that they might, out of the purchase-money, pay the plaintiff her consideration-money.—The defendants insisted she should only come in with the other creditors for her proportional dividend.

Lord *Chancellor* took time to consider, and gave judgment, that the Court could not assist her any more than the vendor of goods to a bankrupt; and dismissed the bill.

The

The next day Mr. *Madocks*, (who was counsel for *Morrice*, who had a grant of a rent-charge from *Case*) cited *Tardiff* and his wife v. *Scrughan*, 8th December, 1769, before Lord *Camden*.

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It stood over till the 26th, when Mr. *Mansfield* stated that case. *Hewitson* and his wife, seised of a farm in *Northumberland*, of the value of £55 *per annum*, being advanced in age and desirous of advancing their two daughters, plaintiff *Elizabeth* and *Mary* (deceased), proposed to convey it to them, in consideration of an annuity of £20 *per annum*, for the joint lives of *Hewitson* and his wife, and the payment of *Hewitson's* debts.—By indentures of lease and release, *Hewitson* and his wife, in consideration of natural love and affection, and of 5s. conveyed to plaintiff *Elizabeth* and her sister, as joint-tenants, and plaintiff *Elizabeth* and her sister, gave bond, in £500 penalty, for payment of the annuity; but *Hewitson* and his wife did not deliver up the deeds until the vendees had promised before witnesses to pay the father's debts, amounting to £190.—Defendant married *Mary*; previous to her marriage the annuity was regularly paid, and defendant was apprized of the bond before the marriage, and after the marriage paid one half year's annuity, but upon his wife's death (although the moiety of the estate was conveyed to him for life) he refused to pay any further.—*Per Curiam*,—it was declared that the annuity of £20 was part of the purchase-money, and to be borne in equal moieties by plaintiff and defendant, who had an estate for life in one of the moieties; he was therefore decreed to pay a moiety of the arrears of the annuity, and to keep down a moiety of the growing payments.

Lord *Loughborough*.—In that case the Court carried the lien to a consequence not necessary as between vendor and vendee.—The daughter, *Scrughan*, was a joint-tenant. They severed the joint-tenancy. She died, and the other sister was her heir: the bond was a good lien on that sister, then the husband says, I was bound only during the coverture; but it was determined that the vendor had an equitable lien, which affected the defendant's estate for life.—There could not be a stronger case of a lien, because the vendor was secure.

Mr. *Mansfield*.—The question there was only between the daughters, the vendees.

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Lord *Loughborough*.—It would have been unjust against the husband, had it not been the case of a lien; for it was the wife's debt, for which he was bound only during the coverture, and the sister was her representative.—Lord *Camden* stated the case of *Chapman v. Tanner*, and said it was decreed there that the vendor

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vendor had a natural equity (1), he having some of the deeds in his hands, and the money being unpaid.—*Pollerfen v. Moore* is not correctly reported in *Atkyns*, but in substance right; there being in that case purchase-money unpaid. From a note of Lord *Hardwicke's*, I find he says, "I delivered my opinion, that the remainder of the estate purchased was to be liable, by virtue of the equitable lien."—The case of *Foxel v. Heelis* remains: there Lord *Bathurst* doubted whether there was such an equitable lien; it becomes therefore of great consequence that it should be spoken to.—It struck me always that there was such a lien, and that it was so from the foundation of the Court. A bargain and sale must be for money paid, otherwise it is in trust for the bargainer.—If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, is it not the same as to that which is unpaid? (a).

The

(1) The party stated in his answer, that they were left with him as a security: his Lordship declared that a natural equity did arise to him, he having the writings in his custody, and not having been paid his purchase-money, and therefore ordered the principal money and interest to be paid out of the estate, and the writings to be delivered up.

(a) The existence of this species of lien against the vendee, volunteers, purchasers with notice, or persons having equitable interests only, claiming under him, is now universally acknowledged. The principle of it originates in trust. The vendee, in respect of the unpaid consideration, or of so much of it as remains unpaid, being considered as a trustee for the vendor. The result of the cases, as observed by Mr. *Rose*, (vol. ii. 81, n.) establishes the lien in every instance, except where by contract express or implied, from the nature and circumstances of some security (accepted from the vendee; for, as observed by Sir *W. Grant*, 2 Ves. & Bea. 306. the effect of the security of a third person has never been determined;) "the unsatisfied vendor has given up to him the uncharged dominion of the estate. No general conclusion can be drawn from the nature of the security alone, whether it be a transfer of stock, a mortgage of another estate, or of part of the purchased estate, although such securities would raise a strong presumption, yet the conclusion of abandoned lien must still depend on the particular circumstances of the case." Vide Sir *T. Clarke's* observations, in *Burgess v. Wheate*, 1 Bl. Rep. 150. 1 Eden, 211. *Smith v. Hibbard*, 2 Dick. 730. *Austen v. Halsey*, 6 Ves. 475. *Nairn*

*v. Prowse*, ib. 752. *Hughes v. Kearney*, 1 Sch. & Lef. 132. *Trimmer v. Bayne*, 9 Ves. 209. *Elliot v. Edwards*, 3 Bos. & Pul. 181. 183. *Mackreth v. Symmons*, 15 Ves. 329. *Cowell v. Simpson*, 16 Ves. 285. *Grant v. Mills*, 2 Ves. & Bea. 306. *Ex parte Loaring*, 2 Rose, 79. *Ex parte Peake*, 1 Mad. Rep. 346. The three last cited cases, and the observations of Lord *Redesdale*, in *Hughes v. Kearney*, satisfactorily prove that this lien will not be discharged by the acceptance from the purchaser of any negotiable security. Bills of exchange, &c. being to be considered not as a security, but merely as a mode of payment: and in such cases it is of no importance whether the note or bill has been negotiated. But as to the acceptance by the vendor of a covenant, bond, or similar security, the question, whether the lien is thereby discharged, has not met with a satisfactory judicial determination. Mr. *Sugden*, in his valuable Treatise on Vendors and Purchasers, considers it to be clearly settled that it will not be discharged: and Mr. *Rose*, in the above cited note, has ranked these securities with bills of exchange and promissory notes: but from these they are clearly distinguishable upon the above noticed distinction of their being a mode of payment: and the case of *Hearne v. Botchers*, Cary, 25, which is relied on

as



The cause was ordered to stand over upon this point, and in the mean time an issue directed, to try whether *Case* was a bankrupt before the grant of the rent-charge to *Morrice*.—Upon the trial of the issue, the jury found *Case* a bankrupt before the conveyance to *Morrice*, which put an end to that part of the cause, and it came on 15th *May*, 1784, before Lord *Thurlow*, on this question of the lien, when the arguments offered by the counsel on both sides, were little more than a repetition of those before the Lords Commissioners.—Two issues were then directed, 1st. whether the conveyance from Mrs. *Clayton* to *Case*, was intended to defeat her creditors, within the act of 13 *Eliz.* c. 5.—2d. whether the conveyance was an act of bankruptcy, under the stat. 21 *Jac.* 1, the assignees of Mrs. *Clayton* to be plaintiffs at law, and the assignees of *Case* defendants. The cause was tried, and the jury found—1st. that the conveyance was made in order to defeat the creditors—2d. that it was not an act of bankruptcy.

1785.

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v.  
GREGSON.

The cause came on upon the equity reserved, 29th *January*, 1785, when Lord *Chancellor* decreed the purchase to be set aside, and that it should be referred to the Master, to take an account of the rents and profits received by *Case*, and of the sums of money which had been paid by him on account of the purchase, an allowance for which, and all other just allowances, were to be made to his assignees.—A short contest arose as to the costs at law, one issue only having been found for the plaintiffs; but Lord *Chancellor* said, that wherever the material issue is found for the party who sets the cause down for further directions, he must have the costs at law; and therefore directed costs to be allowed to the assignees of Mrs. *Clayton*.

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as an authority by Mr. *Sugden*, is considered by Lord *Eldon*, 15 *Ves.* 338. 343. as inapplicable, and to have been decided upon the ground of equitable interposition in the case of a lost bond; the Court having there considered itself as having jurisdiction to direct payment of the money due upon the bond out of the estate. Lord *Bathurst's* opinion in *Fowell v. Heelis* is considered by Lord *Eldon*, and without disapprobation, as having pro-

ceeded upon the circumstance of the bond furnishing evidence that credit was not given to the land; and notwithstanding the observations in the present and other cases, it may be submitted that the conclusion, whether the lien has been abandoned must depend, in these, as in other cases where a vendor accepts a security, upon the particular circumstances of the case.

1785.

## GRAVE v. The Earl of SALISBURY.

The value of a beneficial lease granted to a natural son, held not to be a satisfaction *pro tanto* of a legacy to the son in the father's will. Court refused a reference to the Master to enquire whether plaintiffs were natural children.

**T**HE late Earl of *Salisbury*, by will dated 30th *August*, 1776, left legacies to several persons, suggested but not proved to be his natural children by a *Mrs. Grave*; and among the rest the sum of £10,000 to *James Cecil Grave*. The bill was filed to establish the will, and for an account of the personal estate; but the defendant's answer stating that the testator had, in his life-time, advanced several sums of money to the legatees, and especially to *James Cecil Grave*, which it was insisted ought to be taken in satisfaction *pro tanto* of their legacies, the *Lord Chancellor* referred it to the Master to enquire into the circumstances of such advancements, and to report them to the Court. The Master found that the testator had granted to *James Cecil Grave* a lease for ninety-nine years of a farm called *Tothalbury-farm*, at the rent of £40 a year, which farm he found had before been let at £142, and reported to be worth to be let at £180 *per annum*. He calculated the difference, between the reserved rent and the real value at twenty years purchase, to be £2,800, and also found that the testator had paid the former tenant of the premises £1,200 for a standing crop, dead stock, and farming utensils, and also £400 for repairs, making together the sum of £4,400.

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When the cause came on for further directions, the question was, whether this sum of £4,400 should be considered as a satisfaction for so much of the legacy of £10,000. *Lord Chancellor* was of opinion that it was not to be so considered, and ordered the legacy to be paid.—Upon this the defendants applied for a rehearing, which now coming on, *Mr. Attorney-General*, *Mr. Madocks*, and *Mr. Scott*, argued for the defendants—that this was a provision made by a parent for a child, and in that case, the general principle of the Court was, that any sum of money advanced was a satisfaction for so much of the legacy, that the case of a putative father was, in this respect, the same with the father of a legitimate child: the rule extended even to a distant relation, if he stood *loco parentis*. If this had been a purchase, it would have been an advancement; the gift, and the expence of stocking the farm, is equivalent to that. Besides there is, in this case, a strong circumstance to shew *Lord Salisbury's* intention; for with respect to one of the other sons, *William Cecil Grave*, to whom he had given the living of *Hatfield*, he had considered that circumstance, and had given him a legacy of £4,000 only.—The principle is fully laid down in the cases of *Jesson v. Jesson*, 2 Vern. 255. *Pusey v. Desbouverie*, 3 P. W. 315. *Hoskins v. Hoskins*, Pre. Ch. 263. *Hartop v. Whitmore*, 1 P. W. 681. *Shudal v. Jekyll*, 2 Atk. 516. If there be any doubt, whether *Lord Salisbury*

*bury* stood in the relation of father to the legatees, that is proper matter of reference to the Master.

1783.

GRAVE

SALISBURY.

*Lord Chancellor.*—The reference which has already gone to the Master, was sufficiently large to have admitted that circumstance to have been stated: it is not so, but no exception has been taken to the report on that account. It would not be proper now to make a further reference to the Master. It might lead to the discovery of the very circumstance which Lord *Salisbury* wished to conceal. If new references were to take place whenever parties wished to bring forward fresh facts, it would lead to inconvenience, and would be doing, upon a re-hearing, what would be the proper subject of a bill of review, where the parties must swear the fact was not in their knowledge at the filing of the former bill. As to the merits—all these cases have been treated as falling within the range of those decisions, that where a person indebted gives a legacy, it shall be considered as being a payment of the debt. I am sorry the Courts have taken it up on that idea, for when parents are making provisions for children, they certainly do not consider it in that light, no law obliges them to make the provision in the extent they do.—The principle has been supposed to be founded in the civil law, I wish the cases in that law had been originally looked into with more accuracy. I question whether it is there taken up on the idea of a debt, or is not rather considered as a presumption repellable by evidence.—The Court has, however, certainly presumed against double portions, and although it has encouraged that conjecture, with a degree of sharpness I cannot quite reconcile myself to, wherever a provision is made directly, or as a portion by a parent or person *loco parentis*, I will not displace the rule laid down by wiser men, that it shall be a satisfaction, however reluctant I may be to follow it: but I shall expect the case to be brought up to that point. In the present case, it would be presuming that Lord *Salisbury* had the idea of a portion in his mind, when he was giving a thing not *ejusdem generis*\* (a).

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*Decree affirmed.*

\* The question of satisfaction has been several times since before the Court; especially in the cases of *Powel v. Cleaver*, post, vol. ii. p. 499, and *Rickman v. Morgan*, post, vol. ii. p. 394.

(a) See the case of *Bengough v. Walker*, 15 Ves. 512, and Sir *W. Grant's* observations upon the principle upon which this case was determined; that to make one gift a satisfaction for another it must be *ejusdem generis*: land not being a satisfaction for money, nor money for land. In the late case of *Ex parte Pye*, 18 Ves. 140, which resembled the present in the circumstance of the object of the testator's

bounty being his natural child, though not so described, the distinction was much discussed between legitimate and natural children, as to the presumed satisfaction of a legacy by a portion in the former case and not in the latter. Lord *Eldon* observed, that he recollected Lord *Thurlow* in the present case, though the decision did not turn upon it, remarked, that as the law will not acknowledge the relation

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tion of a natural child, the doctrine of this Court, on whatever principle founded, is, that if a portion is given to a child by will or a gift, so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *prima facie* an ademption of the whole, or *pro tanto*: but if the legacy is given to a person, standing in the relation of a natural child to the testator, and he afterwards gives that child a sum of money on marriage, the law does not admit the conclusion *prima facie*, that the testator, at the time of making the

will, recognized that relation: the natural child therefore is in so much better a situation, that in his case the advancement is not *prima facie* an ademption, as it is in the case of a legitimate child; the effect of which is, that the presumption is to be formed consistently with the notion, that the testator has less affection for his legitimate child than even for a stranger. As to the cases upon the subject of double portions, vide *Warren v. Warren*, ante, p. 305, and the Editor's note at the end of it.

S. C.  
18 Serj. Hill's  
MSS. 287. 313.

In Court, Easter,  
1783, before  
Lords Commis-  
sioners, Ashurst  
and Hotham,  
also Trin. 1783,  
before all the  
Lords Commis-  
sioners.—20th  
Jan. 1785, before  
Lord Thurlow.

Goods taken in  
distress for rent,  
and replevied,  
the distrainer has  
no lien on the  
goods, but is left  
to his remedy on  
the replevin-  
bond.

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WILSON BRADYLL, Executor of the late WILSON } Plaintiff.  
BRADYLL, Esq. - - - - - }

JOHN BALL, (a Bankrupt) and RICHARD JONES, } Defendants.  
Assignees of BRADBURY, a Bankrupt, and }  
THOMAS HEATHFIELD, and MATHEW JEF- }  
FERIES, Assignees of JOHN BALL, - - - }

**BRADBURY** owing a year and a quarter's rent to the plaintiff's testator, at Midsummer 1780; he, on the 28th of June in that year, caused a distress to be made on his goods for the same, and the costs. *Bradbury* replevied the goods, and entered into a replevin bond to the sheriff, with two sureties, who have since become bankrupts. The cause in replevin was removed into the Common Pleas, but before any proceedings were had, *Bradbury* became a bankrupt, and the defendants *Jones* and *Ball* were chosen assignees, and possessed themselves of the effects of *Bradbury*, (and among them of the goods so distrained) and sold them. After the bankruptcy, the plaintiff obtained judgment in the cause in replevin, and sued out a writ *de retorno habendo*, and filed this bill, insisting that he has an equitable lien upon the goods taken in distress, for a return of the goods, or payment of the value of them by the assignees.

Mr. *Kenyon* and Mr. *Lloyd*, for the plaintiff, contended—that he had a right to follow the goods—that, by the distress, he had obtained a lien upon the goods; and that it was a clear rule in equity, that where a lien is once obtained, it will continue against the party and all volunteers claiming under him. The assignees cannot be in a better situation than the bankrupt himself.—If this was not so, the taking the bond, which is an auxiliary security, would take away the primary one, and that too by an act of law, and it would be easy for tenants to cheat their landlords by replevying the goods, and giving bad sureties. The different rule under bankruptcy,

bankruptcy, and in case of executions, is well known : under the 8th of *Anne* the landlord can only have one year's rent ; but under a bankruptcy he may take the whole rent due. The *retorno habendo* not issuing till after the bankruptcy, is material in equity ; for the first lien is carried through the whole transaction.

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 v.  
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Mr. *Madocks*, for *Heathfield* and *Jefferys*, assignees of *Ball*, who had become bankrupt.—It is not necessary to come into a court of equity for relief in this case. Upon the *retorno habendo* issuing, if the return was that the goods were eloigned, a *withernam* went at law against other goods of the tenant. If he had no other goods, a *scire facias* went against the sheriff.—The act of the 11 *Geo. 2.* enables the sheriff to take a bond with sureties, which he may assign to the landlord, that he may sue the sureties ; so that the remedy is complete, without the interference of a court of equity.—Mr. *Lloyd* says, there is a lien, if so, it must be an equitable lien. There is no authority which says that he has a lien here, having none at law. The landlord distrains the tenant's goods, they are delivered, in due course of law, out of his hands, on the security of the sureties and of the sheriff. There is no necessity for a lien.

Mr. *Arden*, for *Jones*, the other assignee.—This is a case which must have happened over and over again, but it is the first time it has been brought before the Court.—The question is, whether the landlord cannot recover the goods from the assignee of the distrainee.—*Trover* never has been brought.—Mr. *Kenyon* must contend, that he might have brought *trover* against the assignee ; but if the assignee has sold them, the lien is gone.—At common law the distrainor could not sell the distress, but the statute has converted distresses into executions.—If the sheriff upon the *retorno habendo*, returns *elongata*, the party has his remedy ; first, against the securities ; secondly, against the general goods of the tenant ; but by the bankruptcy, the remedy against the general goods is gone.—It is allowed, that if *Bradbury* had sold them, an action could not be brought against the purchaser ; could an action for money had and received lie in that case against *Bradbury* ? The auxiliary remedy is substituted. There is no rule, that where there is a substitution, that instead of which it is substituted should remain liable.

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Mr. *Hollist*, on the same side.—Before the statute of *Westm. 2.* the tenant had a right, upon the distress made, to replevy the goods, and the landlord had no security ; he had only the writ of *retorno habendo* ; and if the goods were sold, he could do no more.—The statute of *Westm. 2.* gave pledges, the consequence of which was, that if the plaintiff got judgment for a *retorno habendo*, and the goods had been sold, the sheriff returned them *elongata*, then the landlord

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landlord was entitled to a *capias in withernam*; but if the distrained had no goods, or the distrainer did not choose this remedy, he had a *scire facias* against the pledges. If the sheriff made his return *scire feci*, the landlord had his action for the value of the goods. If the pledges had no goods, the landlord had his action against the sheriff himself for taking insufficient pledges; but if the goods were eloigned, and became the property of another person, he could not follow them.—The statute 17 *Car. 2. c. 7.* gave a new remedy; that where the plaintiff in replevin became nonsuit, or there was a *non-pross*, or judgment on demurrer for the landlord, it was to go to a jury to assess the value, for which the landlord might have execution against the tenant.—But in this case the landlord has sued out the *retorno habendo*.—The statute 2 *W. & M. sess. 1. c. 5.* gave a sale of the distress.—Before that statute the goods must have remained in the sheriff's hands.—By that act, at the end of five days the distress may be sold, but the purchaser would be in by the tenant.—The statute 11 *Geo. 2. c. 19.* gave the additional remedy of the replevin bond, which the landlord may sue, or may have his action against the sheriff. In all this course, the landlord had no title to the goods, he had only a right to call upon the sheriff to take them into his possession. The writ carries the idea of the right of the tenant to sell the goods, the landlord has no interest or property in them, he cannot prevent the replevin. *The King v. Cotton, Park. 112*—the five days had elapsed, but the goods were not sold; an extent issued from the crown tested after the writ was out: the result of that case was, the extent prevailed against the distress, because the goods, not being sold, were still the property of the tenant; it would have been the same in case an execution had come prior to the sale of the distress.—Here the landlord has taken the return that the goods are eloigned, and they are eloigned by the act of law. What the plaintiffs aim at here, would put them in a better situation than the crown.—If the extent had been tested the day after the assignment, the crown could not have touched these goods. The bargain and sale by the Commissioners, took away all the right of the landlord.—The assignees themselves sold the goods before the landlord was entitled to the *retorno habendo*.—Then, if *Bradbury* himself had sold the goods after the replevin, the result must have been the same; his other goods would have been liable, and if he had none, the pledges would. In many cases the assignees are in a better situation than the bankrupt.—In the case of bankruptcy, if the landlord does not distrain whilst the goods are upon the premises, he must come in as a creditor. As to his prior and auxiliary security, it is merely the hardship of the case: a man taking what he thinks a better security, frequently gets a worse. If the obligee in a bond sues the obligor, and obtains judgment, the obligor dies intestate; the obligee has lost the benefit of his bond, and must take only half the land by *elegit*. The replevin bond was not forfeited before the bankruptcy,

ruptcy, so that *Bradbury* is not discharged: he and the sureties may be sued; for, till the return awarded, there was no forfeiture of the bond; and the landlord still has his remedy against the sheriff by *scire facias*, or by action, for taking insufficient sureties. The gentlemen on the other side have not cited a single case to shew that the landlord has a lien, nor any thing even analogous to it—only a mere *ipse dixit*, that he had a lien.—Upon the whole, the landlord is not entitled to any relief in a court of equity.

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Mr. *Kenyon*, in reply.—The gentlemen on the other side producing no precedent, there is no great need for a precedent on ours. By the writ, the landlord is to be put in perfect security. All the remedies are accumulative for his benefit. If the course of the law will give a remedy, Mr. *Madocks* says he cannot come here; but this is the case where the tenant is a bankrupt and has no goods, the pledges are also insolvent, and the sheriff is not liable for taking insufficient pledges, because when taken they were solvent.—The judgment of the Court is, that the sheriff cause the goods distrained to be restored in specie.—The only argument which is made use of arises from the case of *The King v. Cotton*. Your Lordships will consider that was between the King and the subject.—The King has a right, in preference to the subject distraining; but in the case of goods distrained, they could not be taken under an execution.—Here we are contending on the same ground as if it were with the tenant himself. If the goods remained in specie, they must be returned; if not, the money for which they sold, must be paid over. The assignees are liable to all the equity to which the bankrupt would be liable. The money is a deposit in their hands for the person who would have had a right to the goods, if they continued in specie. As to the goods being eloigned by act of law, the law stands indifferent between the parties. I do not find myself bound to contradict *The King v. Cotton*—that case went on the prerogative process.

Next day, Lord Commissioner *Ashhurst* ordered the case to be spoken to again when the Court was full, and particularly, whether after the *retorno habendo*, and the goods returned, they could be sold under the statute; at common law (he said) the sheriff could only keep, not sell them. A distrainor has no property in the goods, they are only in the custody of the law for his security.

This cause came on again in *Trinity* term before all the Lords Commissioners, according to order.

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Mr. *Kenyon*, for the plaintiff.—The goods have gotten into other hands by the replevin, but are subject to Mr. *Bradyll*'s right. If they had remained in the hands of the bankrupt, they would have been subject to the *retorno habendo*—and being in the hands
of

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of the assignees, they are clothed with the same equity as before, and the money produced by the sale is subject to the plaintiff's claim. A question was thrown out as to the right of the parties after the *retorno habendo*, and whether the sheriff could sell. As the law which gave the return is a remedial law, the fair exposition is, that when there is judgment for a return, it shall be considered as subject to all the rights which operated before, and must stand in the same situation as before the replevin.

Mr. *Madocks* and Mr. *Arden*, for the defendants, contended—that the plaintiff's lien only continued till the goods were delivered by the replevin; and the statute only giving a sale if the goods are not replevied, the sheriff cannot sell in any other case:—that upon *elongata* returned, the statute gave a remedy against the other effects of the tenant, and that, notwithstanding the acts were remedial, and favourable to landlords, they did not vary the nature of his property. *The King v. Cotton*, they observed, proceeded on other grounds than merely that of prerogative. There being in this case no contract, there could be no equitable lien arising from contract; and the legal lien being gone by the replevin, the plaintiffs had no lien on the goods, but must seek the other remedies.

Lord *Loughborough*, Lord Commissioner.—This is an application to a court of equity, on the ground of a lien upon these goods in the hands of the assignees. The difficulty of deciding this case is increased by that of *The King v. Cotton*. When the goods are replevied, they are delivered over to abide the event of the suit. If they came afterwards into the hands of persons in privity with the tenant, they would be liable upon the return, &c. If sold, an action for money had and received, would lie for the money. If this were not the case, the law would be very defective: but the persons who had received money for them, would certainly be liable in an action for money had and received. If the assignees are liable in equity, the value being settled, they must be so at law, the ground will be the same to recover there.

Therefore ordered the bill to be retained, and an action to be brought for money had and received to plaintiff's use, against the assignees, the defendants to admit that they sold the goods taken in distress to an amount exceeding the rent.

An action was accordingly brought by the plaintiff against *Jones* the original assignee of *Bradbury*, and *Heathfield* and *Jefferies* the assignees of *Ball*, the other assignee of *Bradbury*, and tried the ensuing sittings in the King's Bench, when a verdict was found for the plaintiff, subject to a case reserved for the opinion of the Court.—The case was argued in *Trinity Term*, when the Reporter is informed, Lord *Mansfield*, Mr. Justice *Willes*, and Mr. Justice *Buller*, threw out an opinion against the plaintiff's claim;

claim; but Mr. Justice *Ashhurst* seeming doubtful, Mr. Justice *Buller* said that there must be a nonsuit, as the action was brought against the parties jointly, who had not received at the same time. A nonsuit was accordingly entered. Upon an attachment being taken out for the costs of the nonsuit, the plaintiff petitioned the *Lord Chancellor*, that the defendants might be restrained from calling upon him for them, the action having been brought under the authority and by direction of this Court. *Lord Chancellor* ordered the money to be brought into Court, to abide the event of the cause. Another action was brought, and being tried at the sittings after *Trinity Term*, a verdict for the plaintiff was again found, subject to a case reserved for the opinion of the Court. That case was argued last term, and the Court of King's Bench were unanimously of opinion, that the plaintiff had no lien upon the goods, and ordered another nonsuit.

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The cause came on now, 29th *January*, on the equity reserved. The counsel for the plaintiff made a slight application to have it re-heard; but this not being insisted upon, the bill was ordered to be dismissed; which drew on a question as to costs, particularly the costs of the nonsuit, which were at length ordered to be paid out of the money paid into Court for the purpose. So that, finally, the bill was

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Dismissed with costs at law; but without costs in equity (a).

(a) See this case cited Co. B. L. 192, 7th edit. as establishing the principle laid down in *Ex parte Devine*, ib. 190, that the landlord has no lien upon the goods after they are removed from the premises. As to the general doctrine

upon the point, that by the relinquishment of the property, a lien that has attached is thereby lost, vide *Sweet v. Pyne*, 1 East, 4. *M'Combie v. Davies*, 7 East, 5. *Whitaker on Lien*, 68.

In the Matter of HASSENCLEVER, a Bankrupt.

PAPERS had been delivered out several years ago, for the purpose of being examined, and some time since an order had been obtained that they should be restored. Application had been made for the return, and refused. The order had been served personally, but no writ of execution of the order had been served or sued out.—Mr. *Reed* moved the last day of the term for a sequestration *nisi*, and the rule was granted as of course.

Sequestration
nisi granted for
not returning
papers according
to order.

CATOR

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Before Lords Commissioners Loughborough, Ashurst, and Hotham, 27th June, 1783.
Before Lord Thurlow, Lincoln's-Inn Hall, 9th March, 1785.

B. entered into bonds to *H.* and took a counter bond. *H.* deposits *B.*'s bond with *C.* as a security. Bill filed by *C.* against *B.* and *H.* that *B.* might pay him out of the debt to *H.* dismissed.

CATOR v. BURKE, and others.

DEFENDANTS *Edmund* and *Richard Burke*, had entered into a bond of £500 to the other defendant *Hargrave*, for securing £250, dated 5th September, 1777, (together with other bonds, amounting to £1,050) and had taken from him a counter bond for securing the said sum of £1,050. Afterwards the defendant *Hargrave* borrowed of the plaintiff *Cator* £100 on his own promissory note, and deposited defendant *Burke*'s bond with plaintiff as a security. The £100 not being paid, the plaintiff filed this bill, praying the defendants *Burkes* might pay to the plaintiff what should be found due on account of the £100 and interest, out of the money secured by their bond. The bond appeared to be given for the purpose of satisfying creditors of *William Burke*, a relation of the defendants *Burkes*, between whom and *Hargrave* there was matter of account, on which *William Burke* was debtor; and that there was also a matter of account outstanding between *Edmund Burke* and the defendant *Hargrave*.

Mr. *Madocks* and Mr. *Hollist*, for the plaintiff, argued (upon Lord *Loughborough*'s expressing a doubt what remedy the plaintiff could have in equity)—That the relief was by preventing the defendants *Burkes* from setting up the counter bond, as a defence against any action which might be brought against them at law, in the name of *Hargrave*. That the bond here, being lent for the purpose of raising money, and a counter bond taken, was a fraud, and the holder of the bond ought to be protreted against the counter-bond so taken being used as a defence.

Mr. *Hollist* cited the case of *Lord Shelburne v. Tierney**, in the Exchequer, where, in the action at law, Lord *Shelburne* pleaded the

* The plaintiff, 18th May, 1769, executed to *Laughlin Maclean*, three bonds for £5,000 each, payable with interest three months after date; *Maclean* assigned these to the *Panchauds* at *Paris*, and they to defendant *Tierney*. In Hilary Term, 1771, he brought his action against plaintiff in the name of *Maclean*. In Easter following plaintiff filed his bill against *Tierney*, *Maclean*, and the *Panchauds*, for an injunction to stay the proceedings in the action, and therein stated that the bonds were executed by plaintiff, as accommodation bonds to enable *Maclean* to raise money for himself, and that counter bonds of indemnity were executed by *Maclean* to the plaintiff. That *Maclean* had assigned them without consideration to the *Panchauds*, and then to *Tierney*, who now sued at law, pretending that money was paid for the bonds, or that they were taken in payment of debts; whereas the bill charged if there were any such debts, that they were upon illegal stock-jobbing transactions—that the assignments were antedated, with a fraudulent view, they having been made after the *Panchauds* failed, and therefore invalid.—An injunction was obtained, and in May, 1772, *Tierney* put in his answer, admitting the bonds and counter bonds and the assignment to the *Panchauds*, but denying any knowledge of the consideration, admitting also the assignment to himself, and stating it to be in consideration of a debt due to him from the *Panchauds*, and that they were delivered to him previous

the counter bond, and the plaintiff filed a bill to restrain him from setting it up :—Lord *Shelburne* submitted.

Lord *Loughborough*.—Then the Court did not decree that he should not set up the counter bond.

Mr. *Kenyon*, for defendants *Burkes*.—Whoever takes a security which at law is unassignable, must take it subject to every defence which can be made against it.

Mr. *Arden*, for defendant *Hargrave*.—The question for your Lordships to decide is, whether the holder of the bond, using it with the consent of the obligor, the obligor can contend at law, to set off against it, as an unassignable security. An unassignable security at law, if assigned by the consent of the obligor, will be held in equity to be the same as an assignable security.

Lord *Loughborough*.—Suppose the bond had been paid off, but had continued in *Cator*'s hands, the argument will go to this, that *Burke* could not set off the payment unless indorsed upon the bond. It is turning an unassignable into an assignable security. It is a very different case from a bond given to be deposited with *Cator*. The whole question is between the co-defendants. The bond can never be considered in any other light than as an unassignable security; to consider it otherwise would bring all the causes on bonds in *Westminster-hall* into this Court. The plaintiff has mistaken both the law and equity; for first he has supposed that the holder of a bond might, where there was no discovery to be made, come hither and have a different relief from what he could have at law; and secondly, that if there was fraud in giving the counter bond, it could not be made use of at law. When this bill is dismissed with costs you may bring your action in the name of *Hargrave*. If this bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that is given.

Ordered the bill to be dismissed with costs.

Mr. *Hollist* prayed that the bond, assignment, and other evidence might be entered as read.

previous to their failure, though formerly assigned afterwards; denying the stock-jobbing transactions, and giving a schedule of the account between the *Panchauds* and himself. The *Panchauds* also put in their answers, agreeing in the facts with that of *Tierney*, and stating the assignment from *Maclean* to them to be for a fair debt. On the 26th of *May*, defendant *Tierney* obtained an order to dissolve the injunction upon the coming in of the answers, unless cause; and exceptions having been taken to the answers, and over-ruled, the injunction, 23d *June*, 1772, was dissolved on the merits.

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Lord *Loughborough*.—If you had brought your bill on a bond, and there had been no demurrer, the bill must nevertheless have been dismissed. I see no reason therefore for the evidence being entered as read. But Mr. *Hollist* pressing the matter that in case of an appeal, no evidence could be read above which was not read here, and desiring that the evidence might either be entered as read, or the request and refusal by the Court be taken notice of—it was entered as read. It came on now before Lord *Thurlow*, upon a re-hearing, when his Lordship was of opinion that a special purpose appearing for the bond to *Hargrave*, and that it was not to give a general credit, the plaintiff was not entitled to the remedy prayed, and therefore affirmed the Lord Commissioners orders of dismissal (a).

(a) As to the liability of the assignee of a chose in action to all the equities to which it was subject in the hands of

the assignor, vide *Austen v. Davies*, post, vol. iii. 178. and the Editor's note

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Devise of "all I
am worth," will
pass real estate.

(m) HUXTER v. BROOMAN.

THIS was a bill for an account of the real and personal estate of the testator, under a most singular will. "*Feversham, November 1783*. This being my last will and testament, I give and bequeath to *Mary*, daughter of *Mary Huxter*, and likewise to the son and daughter of *Susan Topley*, all the overplus of my money; and likewise beg of my executor, that he will pay into the hands to the above children's friends, all the money that is due to me on settling my father's account.—(a) *Friday*, I give and bequeath to them, *all I am worth*, except £20, which I give to my executor Mr. *Thomas Brooman*—signed *Edward Brooman*—witness *William Dean, Elizabeth Roots*, and underneath, about the middle of the paper, *Sarah Coslon*."—The word *worth* was nearly obliterated, and the whole will bore manifest proof of the testator's being very illiterate.—The testator was entitled to a share with his brothers, in a gavel-kind estate, which had lately descended by the death of his father; and the only question was, whether this will passed the real estate.

Mr. *Mansfield*, for the plaintiff, barely said—*all he is worth*, must pass the real as well as personal estate.

(m) Vide *Cliffe v. Gibbon*, 2 Lord Raymond, 1324.

(a) Lord Chief Justice *Gibbs*, 7 Taunt. 81. in commenting upon this case, took particular notice of the word *Friday* being inserted in the writ-

ing; that the latter was a substantive bequest, standing independent of the prior part of the will.

Mr.

Mr. *Madocks* and Mr. *Harvey*, for the defendants, insisted—that here being no expression in the will which pointed at the real estate, only the personalty could pass; no determined case has come up to the present. They are mostly accompanied with the circumstance of there being introductory words in the will, which shew that the testator intended to dispose of his whole property.—In *Bowman v. Milbank*, 1 Eq. Ab. 208: *All to my mother*, was held not to pass lands.

Lord Chancellor observed—that that was the case of a nuncupative will, and thinking it clear that the terms *all I am worth*, without other words to controul them, must pass real as well as personal estate, decreed for the plaintiff (a).

(a) For the doctrine upon this subject, and the application of the words *estate, property, effects*, and similar expressions, to real estates, vide Mr. Cox's note to *Barry v. Edgeworth*, 2 P. W. 523. *Cave v. Cave*, 2 Eden, 139. *Hogan v. Jackson*, Cowp. 299. *Doe v. Butler*, 6 T. R. 610. *Doe v. White*, 1 East, 33. *Camfield v. Gilbert*, 3 East, 516.

Barnes v. Patch, 8 Ves. 604. *Woollum v. Kenworthy*, 9 Ves. 137. *Doe v. Lainchbury*, 11 East, 290. *Doe v. Langland*, 14 East, 371. *Doe v. Trout*, 15 East, 394. *Roe v. Yeud*, 2 T. R. 214. *Doe v. Dring*, 2 M. & S. 448. *Nicholls v. Butcher*, 18 Ves. 193. *Doe v. Rout*, 7 Taunt. 81.

HALL v. SMITH.

THIS was a plea to a bill of revivor, in a case where nothing remained but the matter of costs, which had been ordered to be paid into the Bank, and being unpaid at the time of the death of the party, the question was, whether a bill of revivor would lie against the representative. In support of the plea it was argued, that where the party who is to pay costs dies, it is a personal debt, and dies with him, unless the costs are ordered to come out of a particular fund; although where the party who is to receive the costs dies, his representative shall have his remedy against the party decreed to pay. For the plaintiff, it was objected, that this doctrine only held where the costs were not taxed, but that as soon as the costs were liquidated, the debt was become certain, and it was proper matter for a bill of revivor and supplement, as in truth this was, it praying an account and payment out of assets.—The cases cited at the bar, were *White v. Hayward*, 2 Ves. 461. *Johnson v. Peck*, 2 Ves. 465. *Kemp v. Mackrel*, 2 Ves. 579. and 3 Atk. 812. *Blower v. Morrets*, 3 Atk. 772.—To these the register added, from a manuscript book, the case of *Edgel v. Brown*, to the same effect.

Lord Chancellor thought the costs having been taxed, this case was not within the general rule, and made it certainly matter of revivor; if they had not been taxed he might have laid hold of the circumstance

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Plea to bill of
revivor for costs
ordered to be
paid into the
Bank, over-ruled.

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stance of their having been ordered to be paid into the Bank, as taking the case out of the rule: and therefore over-ruled the plea (a).

(a) The doctrine upon this subject was much discussed in *Morgan v. Scudamore*, 2 Ves. jun. 313. 3 Ves. 195. *Jenour v. Jenour*, 10 Ves. 572. and *Lewten v. The Mayor and Commonalty of Colchester*, 2 Meriv. 118. The exceptions to the rule that there shall be no revivor for costs alone, are, 1st, all cases where the costs have been taxed previous to the abatement; 2dly, where

the costs have not been liquidated by taxation, but have been decreed to be paid out of a particular fund; 3dly, revivor has been permitted on the death of the plaintiff, though before the report, and though they were not to come out of a particular fund. As to appeals or re-hearings for costs, vide *Wirdman v. Kent*, ante, 140.

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## EASTER TERM.

25 GEO. III. 1785.

## ATTORNEY-GENERAL v. COWPER.

Trustees were directed to be inhabitants of B. An information to remove them, because not inhabitants, must shew there were proper persons in B. to be trustees.

**T**HIS was an information for the purpose of removing trustees of a charity-school at *Blencowe*, in the county of *Nottingham*. The founder had devised lands, after the decease of his wife, to trustees, for the purpose of supporting the school, and had directed that so often as his said trustees should be reduced to two, such two survivors should nominate a certain number of persons, being inhabitants of Great or Little *Blencowe*. The objection taken to the trustees was, that they were not inhabitants of either of the *Blencowes*.

Mr. *Attorney-General*, in support of the information,—cited a case of the *Attorney-General v. France*, before Mr. Baron *Eyre*, sitting for Lord Chancellor, 1780, where there was a similar devise, and said that Mr. Baron *Eyre* thought the circumstance of inhabitancy so material, that he removed the trustees on that ground only.

Lord Chancellor said—he could not but doubt that case to have been determined upon this ground. He conceived there must have been some special ground which did not now appear: but in this case there should have been evidence to shew that there were proper persons in *Blencowe* to be trustees, and the trustees neglected to elect them.

*Information dismissed, with 40s. costs.*

SHIRLEY

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## SHIRLEY v. STRATTON.

**T**HIS was a bill for the specific performance of an agreement for the purchase of an estate in marsh-land at *Barking* in *Essex*, and for payment of a sum of £1,000, the purchase-money. The defence was, that the estate was represented to the defendant as clearing a neat value of £90 *per annum*, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river *Thames*, which would be an out-going of £50 *per annum*. And it appearing upon evidence that there had been an industrious concealment of the circumstance of the wall during the treaty (a).

Specific performance not decreed where there is a concealment on the part of the vendor.

*Lord Chancellor dismissed the bill, but without costs.*

(a) As to relief against fraudulent suppression of some defect in an estate, vide *Grant v. Munt*, Coop. Rep. 173. *Ellard v. Lord Llandaff*, 1 Ba. & Be. 241. Sugd. Vend. & Purch. 261. et seq.

## (o) NIGHTINGALE v. LAWSON.

**T**HIS bill was filed against the defendant *Isabella Lawson*, as executrix of *Elizabeth Barnard*, who was also executrix of her late husband *Ernest Barnard*, for an account of the personal estate of *Ernest Barnard*. The defendant in her answer insisted on being allowed sums of money paid by Mrs. *Barnard* during her widowhood to the city of *London*, for fines and expences of the renewals of leases of the *Brawn's Head Tavern*, and another house in *Bond-street*, which had been made the subject of a settlement on her marriage with her late husband, and also of the will of the said *Ernest Barnard* of the 19th *May*, 1750, by which he gave to his said wife, all the residue of his estate (in which these houses were included) during her widowhood, but after her decease or marriage gave the same to the plaintiffs, who were her brothers.

Tenant for life renews and pays fines,—what proportion he shall bear with the remainder-man, &c.

The cause had been heard before the late Sir *Thomas Sewel*, and by him referred to the Master, who had reported a certain sum. Exceptions had been taken, and it had come on upon a re-hearing the 8th of *May*, 1784, when the *Lord Chancellor* referred it to the Master to state the circumstances and expence of the several renewals.—These appeared upon the Master's report to be as follows:—the original lease was for the term of ninety-nine years, which would expire in 1776. At the death of *Ernest Barnard* fifteen years were unexpired. On the 10th of *December*, 1754, Mrs. *Barnard* agreed with the committee of city lands for a

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(o) *White v. White*, 4 Ves. 24, in which case this question seems to have been fully discussed.

lease

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lease for twenty-eight years from *Lady-day*, 1766, in order to make up her term forty years from *Lady-day*, 1754. For this renewal she paid £210 for the *Brawn's Head*, (being three years rent, deducting a ground rent) with interest upon that sum for three years, at the rate of £5 *per cent.* and also 2s. yearly till the commencement of the term of twenty-eight years, as an acknowledgment of the right of the city, also a ground rent of 10s. *per annum* during the term of twenty-eight years; and for the other house she was to pay a fine of £131. 5s. being also three years improved rent, after deducting a ground rent, with the like interest, and a like rent of 2s. and the leases were to be renewable every fourteen years for ever, upon payment of a fine of one year's improved rent.—Accordingly on the 30th of *April*, 1755, Mrs. *Barnard* paid into the chamber of *London*, the following sums :

|                             |   |   |   | £                     | s. | d. |
|-----------------------------|---|---|---|-----------------------|----|----|
| For the <i>Brawn's Head</i> | - | - | - | 210                   | 0  | 0  |
| Three years interest        | - | - | - | 31                    | 10 | 0  |
| Fine for the other house    | - | - | - | 131                   | 5  | 0  |
| For three years interest    | - | - | - | 19                    | 13 | 9  |
| For expences of the leases  | - | - | - | 26                    | 2  | 0  |
|                             |   |   |   | <hr/> £418 10 9 <hr/> |    |    |

On the 12th of *March*, 1768, she again renewed the leases for a further term of fourteen years, in order to complete her term of forty years.—She then paid

|                             |   |   |   | £                    | s. | d. |
|-----------------------------|---|---|---|----------------------|----|----|
| For the <i>Brawn's Head</i> | - | - | - | 70                   | 0  | 0  |
| For the other house         | - | - | - | 43                   | 15 | 0  |
| For expences                | - | - | - | 25                   | 10 | 0  |
|                             |   |   |   | <hr/> £139 5 0 <hr/> |    |    |

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*Eleanor Barnard* died the 2d *February*, 1775, which was nine years after the commencement of the renewed term, and by her will gave all her personal estate to the defendant, and appointed her sole executrix.—The Master in his report proceeded to value the advanced payments, and stated that twelve years of the original term being to come, and Mrs. *Barnard* having renewed for a term of twenty-eight years, to commence at the expiration of the first term, at the expence of £418. 10s. 9d. and also incurred an increased rent of 2s. a year, and the said sum having been paid  
twelve

twelve years before the commencement of the renewed lease: he had calculated that that sum, with interest upon it at the rate of £5 *per cent.* would have amounted to £669. 12s. 9d. and the increased rent of 2s. *per annum*, would have amounted to £2. 8s. But as *Eleanor Barnard* enjoyed the benefit of the renewed lease near nine years, he had apportioned the same between her as tenant for life and the plaintiff as remainder-man, and found the plaintiff's proportion of the £669. 12s. 9d. to be £457. 7s. 9d. and of the £2. 8s. to be £1. 12s. 10d. which he conceived ought to be allowed, with simple interest at *least*, at the rate of £5 *per cent.* from the time of the commencement of the renewed term, but submitted to the Court whether she should not be allowed compound interest. And with respect to the renewal in 1768, from which *Eleanor Barnard* never received any benefit, he conceived she ought to be allowed the whole thereof, with simple interest at *least*; and submitted whether compound interest ought not likewise to be allowed upon that.—The cause now came on for further directions upon the Master's report.

Mr. *Madocks* and Mr. *Ainge*, for the plaintiffs—contended that only simple interest could in any case be allowed, that the clearest way would be to calculate the whole expence as a charge, and then the tenant for life must keep down the interest. The Master has calculated the whole upon the ground of making the tenant for life pay one-third and the remainder-man two, and he has given five *per cent.* interest, which is contrary to the common rule of the Court.—They referred to the cases of *Lock v. Lock*, 2 Vern. 666. *Verney v. Verney*, 1 Ves. 428.

Mr. *Scott*, on the other side—contended she was entitled to compound interest; she was every year another year's interest out of pocket upon a bargain which she was not obliged to make. It would be difficult to prove that she was compellable to make any renewal; of course what proportion she ought to pay of any when made.—But she certainly should be allowed compound interest, for all public bodies, such as that with which she treated, calculate their fines so as to pay compound interest.

Lord Chancellor.—The cases in which the nature of the estate, or the will of the testator compels a renewal, appear to me not to apply to the present. Where there is no such custom or direction, it is in the discretion of the tenant for life to renew or not; but if he renews, the law will not permit him to renew for his own use, but will make him a trustee for the remainder-man: then upon what terms shall the remainder-man be entitled to it? As to the idea that it is to be upon the payment of two-thirds or any other proportion, that cannot be the rule; for if there were twenty

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or thirty years of the existing lease to run, it cannot be thought for the benefit of the tenant for life to renew.—In this case in 1754, when twelve years were to come, she renewed for twenty-eight. She enjoyed it nine years after the expiration of the twelve; leaving nineteen years of the twenty-eight. The Master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, *that is of the term (a)* of twenty-eight years, to commence at the expiration of twelve years. He should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter is the proportion to be paid by the remainder-man. Then as to the kind of interest to be allowed.—Simple interest will not be a satisfaction, as she laid out her money totally; and the value of the lease was calculated upon the ground of compound interest.—Compound interest must therefore be computed upon the proportional value of the nineteen years term to the whole expence of renewal. Then as to the rate of interest; in computing compound interest you go upon the idea that the interest is paid upon the exact day and immediately laid out; but as this is impossible, it will be sufficient to compute compound interest at 4 *per cent.*—But this is only to be paid till her death, for after that her executors had the demand upon the remainder-man; and it becomes a common debt, and must carry simple interest only.—With respect to the second renewal, her executors are entitled to the whole of the expences, and the rule of interest must be the same.—This seems to be the justice of the case: for as on the one hand the tenant for life cannot renew for his own benefit (*b*); so on the other, the remainder-man shall not have the renewal at her expence\* (*c*).

\* In *Maxwell v. Ashe*, November 6th, 1752. An annuity for life was given out of the leasehold, and the annuitant was held not to be bound to contribute to the expence of the renewal.—See also the case of *Stone v. Theed*, vol. ii. page 243.

(a) Mr. Cox, in a short note of this case, 1 Cox, 184, suggests the following correction of an error in the printing, which makes this passage difficult to be understood: instead of the words “to that of the term,” read “viz. the term.”

(b) As to the doctrine upon this point, vide *Pickering v. Vowles*, ante, 197, and the Editor's note to it.

(c) The old rule of distribution, which threw one-third on the tenant for life, is (as it has been in mortgages) exploded. Editor's note to *Lawrence v. Maggs*, 1 Eden, 456. *Stone v. Theed*, post, vol. ii. page 243. *White v. White*, 4 Ves. 24. In the latter case (and in *Buckridge v. Ingram*, 2 Ves. jun. 652). Lord Alvanley is reported to have considered that the tenant for life ought

to pay nothing but the interest. Lord Eldon, however, when that case came on upon appeal, 9 Ves. 554, disapproved of the doctrine, on the ground of the possible inequality; it being better to determine the proportion upon fact than speculation; therefore if the tenant for life is bound to pay in any degree, he ought to pay in proportion to the benefit, he *de facto* takes under the effect of the transaction, and the remainder-man ought also to pay with reference to his proportion of that benefit; viz. that interest in the renewed term, which is *ultra* so much of the renewed term as expired in the life of the person who renewed. The same course was adopted in *Allen v. Backhouse*, 2 Ves. & Bea. 65.

ATTORNEY.



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## ATTORNEY-GENERAL v. The BISHOP of CHESTER.

**T**HE late Archbishop Secker, among many charitable legacies, gave £1,000, 3 per cent. Bank annuities, to his trustees, the defendant and the late Dr. Stinton, for the purpose of establishing a bishop in His Majesty's dominions in *America*; he also gave £1,000, to be laid out upon repairing parsonage-houses, and ordered that if any charity to which he had given a legacy should no longer subsist, such legacy should fall into the residue.

Legacy towards establishing a Bishop in *America* not void, though none as yet appointed.

Legacy to repair parsonage-houses is good, and the selection of objects to be in the Master, upon proposals laid before him.

Mr. *Attorney-General*—insisted that a gift of money to be laid out in building upon land already in mortmain is good in law; and cited for that purpose the cases of † *Brodie v. The Duke of Chandos*, and \* *The Attorney-General v. Hutchinson*.

Mr.

† *Brodie v. Duke of Chandos*, 14th December, 1773. Ann Thistlethwaite being possessed of a considerable personal estate, by will, dated 23d September, 1740, gave to trustees all her ready money, &c. (subject to her debts), to lay out and expend the same in the erecting and new building of a neat parsonage-house, which her will was, should be erected at the upper end of the garden belonging to the said parsonage-house, to be from time to time had, occupied, and enjoyed by the then present and other future incumbents; and made Robert Thistlethwaite, her nephew, sole executor. The testatrix died without revoking the will, leaving the said Robert Thistlethwaite and his brother next of kin. The Honourable Stephen Fox becoming seised of the perpetual advowson of the living, and having presented the plaintiff thereto, he filed a bill against the defendants, the representatives of the said Robert Thistlethwaite, and the then next of kin (Robert and his brother being both dead), to recover £600, or the residue of the personal estate of Ann Thistlethwaite, for the purpose of building the house.—The cause was heard before Lord Bathurst, 14th December, 1773, and the question being whether this was within the meaning of the statute of *Mortmain*.—Lord Chancellor, 25th January, 1774, pronounced his decree in favour of the charity, no land being to be purchased. The account of the personal estate being waived, he ordered the £600 to be paid with interest for that purpose, and all the parties to have their costs out of the fund.

\* *Attorney-General v. Hutchinson* (a).—Mary Glover, by will, dated 24th September, 1761, directed that £1,500 should be forthwith paid and laid out, under the direction of the Minister and Churchwardens of Royston for the time being, for the purpose of erecting and building a free school at Royston for twelve poor boys and twelve poor girls of the said parish, and she directed that as soon as the school should be built, £2,000 should be placed out at interest, and the dividends from time to time paid to the Minister and Churchwardens for ever, for the purposes following; i.e. £30 per annum, part thereof she directed should be paid for a school-master for teaching the said boys to read and write, and £30 per annum to a school-mistress to teach and instruct the said girls in reading, writing, and plain work; to continue until they should be of proper age to be put out apprentices; and the surplus of the interest of the £2,000 she willed and directed should be applied in and about the repairs of the said free school, &c. and appointed the defendants executors. Upon a bill being filed, the defendants contended that the testatrix having given the £1,500 to be laid out in building a school,

(a) S. C. Amb. 751.

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Mr. *Mansfield*, for the Bishop of *Chester*, did not controvert this, but contended the selection of the objects belonged, since the

school, and the £2,000 being dependant upon it, the whole was void; and the Lord Chancellor (*Bathurst*), 26th May, 1775, dismissed the information as to the £1,500 for building the school: The testatrix not having pointed by the will to the land which the parish had, and the Chancellor thinking there was no ground to presume she meant it; and if the school, which there was already, was given by the lord of the manor, it was not to be converted to other purposes.

With respect to the point in the cases cited, some other cases have been decided, which may be worthy the reader's notice.

(p) *Attorney-General v. Tyndall*, 6th March, 1764.—*Mary Parker*, by will, taking notice that she stood possessed of leasehold premises, devised all and singular her lands and tenements to trustees, to sell the same, and willed that part of the money should be laid out in the purchase of a competent piece of ground for building an alms-house, and directed that not more than £1,400 be laid out therein, and ordered the residue of her personal property should be laid out in the purchase of lands, &c. and the rents to be paid to twenty persons who should be admitted into the alms-houses.

10th December, 1759, Sir *Thomas Clarke* declared the devise of the freehold and leasehold estate void.

24th June, 1761, On further directions his Honour declared, in case the trustees could obtain a gift of a competent piece of ground, the charity would be entitled to have the leasehold and personal estate so marshalled as to throw the debts and legacies on the leasehold, in order to have the mere personal estate applied to the charity.

But on appeal, this decree was reversed by Lord *Henley*, 11th June, 1763, and the personal estate ordered to be distributed among the next of kin (a).

*Pelham v. Anderson*, 11th December, 1764.—Testator directed his executors should build and erect an hospital, for which purpose he charged his personal estate with £2,000. Residue to same uses as real estate.—The bequest of £2,000 was declared void by the statute of mortmain (b).

(q) *Attorney-General v. Bishop of Oxford and others*, 13th July, 1786.—*Thomas Sims*, the testator, by his will, after devising his freehold and leasehold estates therein mentioned, and charging the same with the payment of certain annuities in manner therein mentioned, bequeathed and disposed of his personal estate in the words following; (that is to say) "I give and bequeath to my executors the sum of £100 each for their trouble in executing my will; and all the rest and residue of my personal estate I give and bequeath to them, in trust, to apply the same to build a church at *Wheatley*, where the chapel now is, in such manner as I shall hereafter direct, or, for want of such direction, as my executors shall think best.

The information prayed a general account and directions touching the plan and execution of the charitable bequest given by the testator.

The Bishop of *Oxford*, as Patron and Parson of *Cuddesden*, by his answer, opposed the erection of a new church, unless the surplus of the residue could be applied towards an augmentation of the endowment of the chapelry annexed: The Chaplain and Chapelwarden answered to the same effect, and proposed repairing the old chapel, and with the surplus augmenting the salary of the Chaplain, &c.

The

(p) Amb. 614. S. C.

(q) As to the doctrine of *cy pres*, as applied to charities, vide *Attorney-General v. Boulton*, 2 Ves. jun. 380, and his Honour's observations, *ibid.* 387. *Attorney-General v. Andrews*, 3 Ves. 633 (c).

(a) Since reported, 2 Eden, 207.

(b) Since reported, 2 Eden, 295.

(c) And the Editor's note to *Mogridge v. Thackwell*, post, vol. iii. 517.

the death of Doctor *Stinton*, to the Bishop of *Chester* alone. As to the other legacy, there being no bishop in *America*, or the least likelihood of there ever being one, that is a void legacy, and falls into the residue.

But Lord Chancellor said, the money must remain in Court till it shall be seen whether any such appointment shall take place (a). With respect to the selection of objects for the other legacy, it must be referred to the Master, and proposals of proper objects must be laid before him.

The next of kin insisted that a new church or chapel must be built, and the surplus, if any, divided among them.—As to the repairing, or augmenting the salary of the Chaplain, &c. they opposed that plan, insisting that the intention of the testator must be implicitly followed; in case the Bishop did not allow of a new chapel, that the bequest should be void, and the money divided.

Sir Lloyd Kenyon, Master of the Rolls, sitting for Lord Chancellor, observed, that if the Bishop objected, he could not interfere in the matter; as to repairing, &c. he could not do that.—The intention must be implicitly followed, or nothing could be done.

However, he referred it to the Master to take an account, &c. and to make a special report as to the plan of erecting a new chapel, and the expences attending it; and also with respect to the Bishop's assent for that purpose (b).

(a) See, as to this, *The Attorney-General v. Oglunder*, post, vol. iii. 166.

in land already in mortmain, vide *The Attorney-General v. Nash*, post, vol. iii.

(b) For the doctrine contained in these cases, as to the laying out money

588, and the Editor's note to it.

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## BOYNTON v. BOYNTON.

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SIR Griffith Boynton, Bart. by his will, 27th April, 1771, gave to his wife Dame Mary Boynton, his mansion-house, &c. at *Burton Agnes*, for life, remainder to the plaintiff in fee. He also gave to his said wife an annuity of £1,000, charged on all his real estates (except the estates so devised) in lieu of her dower and thirds. He also gave to her the use of her jewels, and of his household goods, plate, carriages, &c. for life, and a legacy of £200, to be paid immediately after his decease. Then came the clause in the will upon which the question arose: "Provided that if my said wife shall happen to marry again, that then and from thenceforth all and every the devise, annuity, powers, authorities, and bequests, by me hereinbefore or hereinafter given and bequeathed to my said wife (except the annuity of £100 a year hereinafter mentioned) shall cease and be void: and in such case, I give and bequeath to my said wife, during her natural life, one annuity or yearly rent-charge of £100, charged upon all my real estates, to be

Testator, by will, gave his wife £1,000 a year, in lieu of dower, but if she married again, he gave her £100 a year, in lieu of all benefits from his estate. She married, and elected her dower. She shall not have the £100 annuity.

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be paid, &c. the said annuity of £100 to be in full for every benefit and advantage which I mean shall arise out of any my real or personal estates, in case she shall happen to marry again." And made his said wife executrix and residuary legatee of his said will, and guardian to the plaintiff his eldest son, and his other children. On the 6th February, 1778, the testator died without revoking his said will, and Lady Boynton proved the will. In July, 1781, Sir Griffith Boynton, the eldest son of the deceased, filed his bill, praying, among other things, that the defendant Lady Boynton might make her election, either to accept the benefits under the will, or to claim her dower; and that in case she should elect her dower, the same should be settled, and the residue of the real estate should be taken care of for the benefit of the plaintiff, and a guardian appointed. At the same time a bill was filed by the creditors of the testator Sir Griffith Boynton. To these bills the defendants put in their answers, and particularly the defendant Lady Boynton, by her answer, elected to take her dower instead of the benefits given to her by her said husband's will. The two causes came on 15th May, 1782, to be heard at the Rolls, before his Honour Sir Thomas Sewel, who declared that as no account of the testator's personal estate and of his debts, &c. had been taken, the defendant Lady Boynton was not obliged to make any election until the account should be taken, and it should appear out of what real estates she was dowable at the time of testator's decease:—and it was referred to the Master to take an account of the personal estate, and also to state out of which estates the defendant was dowable. On the 16th December, 1783, the Master made his separate report as to the defendant's dower. On the 29th January, 1784, dame Mary, the defendant, intermarried with George Parkhurst, Esq. and 7th April, 1784, the plaintiff filed a supplemental bill, making him a party, stating the marriage, and that in consequence thereof the benefits arising to the defendant dame Mary under the will had become void, and praying that possession of the house, &c. might be given up. In her answer to this bill dame Mary claimed her dower, and submitted to the Court whether she was not also entitled to the annuity of £100 a year given by the testator's will, and also insisted she had a right to her jewels, as being part of her *paraphernalia*.—On the 14th June, 1784, the cause came on before the Lord Chancellor, when his Lordship was pleased to declare, that Lady Boynton having elected to take her dower was not entitled to have the legacy, annuity, and provision made by the will, and ordered proper accounts to be taken. Upon this decretal order the defendants Parkhurst and Lady Boynton presented their petition of rehearing in regard to the annuity of £100, which they contended Lady Boynton was entitled to for life over and above her dower. The cause now came on upon the rehearing.

Mr.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Waller*, for the defendants. There must be an express intention in order to prevent a wife taking dower as well as a legacy. *Lawrence v. Lawrence*, 1 Eq. Ab. 218. 219. *Inclendon v. Northcote*, 3 Atk. 430. *Hitchin v. Hitchin*, Pr. Ch. 133. *Lemon v. Lemon*, 8 Vin. Ab. 366. This annuity given out of his estate is consistent with her dower.—A mere gift of an annuity of £100 would not bar her of the dower. It was meant that if she married the annuity of £1,000 should cease, but this annuity of £100 was anxiously excepted out of the clause.—Suppose she had made her election immediately after the decease, she might have kept every provision made for her except the £1,000 a year: the £100 a year was to be in lieu of the provisions forfeited by marriage, it had nothing to do with her dower, he could not mean it in lieu of the dower, which would be so much larger.

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Mr. *Price* and Mr. *Mitford* for the plaintiff.—This is not a question of forfeiture but of election. In all cases where other benefits are not given in addition to the dower, the lady electing to take dower gives up every thing else.—If the £100 annuity had been given to her simply, she must have elected between it and dower.—When Sir *Griffith* gave her the annuity of £1,000 in lieu of dower he had no idea she would elect the dower.—The £100 was not to take place at all if she accepted the other gifts. It was to stand in lieu of the provision during widowhood.—*Lawrence v. Lawrence*, and *Hitchin v. Hitchin*, are neither of them cases where the doweress had made an election. The question in those cases was, whether taking under the will would preclude dower. The terms of the clause relative to her marriage shew he did not mean her to take this with her dower. It was to be in full for every benefit which should arise to her out of his real or personal estate. These words must include dower as well as any other provision. She must therefore elect between the annuity of £100 and her dower.

Lord Chancellor a few days after the hearing gave judgment.—The question is, whether the testator has declared by express words, or any thing tantamount, that Lady *Boynton* shall have both her dower and this annuity. The question turns upon the clause whereby he gives her in the event of her marrying again £100 a year, as the full benefit she was to derive from his estate. By these expressions I rather think he intended this estate should be quite clear of her. On the other hand it is said this could not be his intent, as he knew this was not equal to her dower; but the cases do not seem to have gone upon any calculation of value between the legacy and the dower.—The natural construction of the words seems to be, that if she married again she should have only  
£1,000

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£1,000 a year. In this the testator's intention is defeated; but she cannot take her dower and the annuity (a).

*Affirmed the decree.*  
*The judgment ex relatione.*

(a) As to putting the widow to her election, vide *Pearson v. Pearson*, ante, 292, and the Editor's note.

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Lincoln's-Inn  
Hall, 13th May.  
In an application  
for a commission  
to examine evi-  
dence to shew  
that the legacies,  
given in two codi-  
cils, were both in-  
tended for the  
legatee, the le-  
gatee ought to  
swear she believes  
that to have been  
the intention.

**M**R. *Mansfield*, supported by Mr. *Scott* and Mr. *Mitford*, moved that the plaintiff might be at liberty to sue out a commission for the examination of witnesses in the *East Indies*, on the following case: Sir *Eyre Coote*, K. B. deceased, late husband of the plaintiff, made his will 9th May, 1778, by which he gave the plaintiff an annuity of £1,000 and other advantages, and gave the residue of his personal estate, after payment of debts and legacies, to trustees, to lay out the same in real estate to the uses therein declared. On the 9th October, 1780, the testator made a codicil to his will, by which he confirmed the same, and thereby gave to the plaintiff £10,000 to be paid within twelve months after his death. He also gave several other pecuniary legacies, and appointed the defendant, the Rev. *Charles Coote*, Dean of *Kilfenora* in *Ireland*, "residuary legatee to the sums of money which should remain after the payment of his debts and legacies." On the 14th December, 1780, he made another codicil, by which he gave the plaintiff £10,000, repeated all the other legacies given by the former codicil in nearly the same words, added a legacy to his god-daughter *Ann Monkton* of £5,000, and appointed Dean *Coote* residuary legatee. Lady *Coote* filed the present bill to have both legacies paid to her, and for this purpose stated circumstances to shew that the former codicil was in Sir *Eyre's* contemplation when he made the second, and that the second was intended by him in addition to and in augmentation of the former, and, among others, a considerable increase of his fortune (which was however contested by the answers.) The executors contended, from the similarity of terms and repetition of the same legacies, that the second codicil was a substitution of the former, and only made for the purpose of introducing Miss *Monkton's* legacy. And now the plaintiff moved for a commission to examine witnesses, in order to introduce parol evidence to prove testator's intention to augment the legacies given by the first codicil by those given in the second. The affidavit upon which the application was grounded was, that Mr. *Graham* and Major *Hay*, the subscribing witnesses to the codicil, were in *India*, and



and that the plaintiff was advised that their testimony *as to what passed between the testator and them at the time of his executing the second codicil*, would be material to her at the hearing.

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The counsel for the plaintiff pressed it upon two points. First, that the presumption, from the legacies being in two different instruments was, that the second legacy was augmentative, and for this they cited *Hooley v. Hatton*, (ante, 390 n.) and said, that in *Greenwood v. Greenwood*, (ante, 30 n.) Lord Bathurst would not lay it down absolutely that being in the same instrument made it a mere repetition. Secondly, that this was a proper case for the admission of parol evidence to explain whether both the codicils were to take place. That the intention might be shewn by other means than merely by what appeared upon the face of instrument, and that in the case of *Beauclerc* and the Duke of St. Alban's Lord Hardwicke said, if there had been any considerable addition to the Duchess's fortune it would have been material, and as that must have been introduced by parol evidence, of course he was of opinion such evidence would be admissible.

Lord Chancellor said, he did not choose to decide questions of such importance upon a motion. If the second codicil had only given the wife a legacy of the same sum he should have thought it not an ademption of the former but accumulative; but where all the legacies are repeated, it made it seem only to be a substitution. If her's is doubled all the rest must be so likewise\*. But he thought, in order to have a commission to introduce the parol evidence, Lady Coote ought to swear that she believed the legacy in the second codicil was meant to be augmentative, which she had not done: and without it the issuing the commission would appear only to be for delay.

The plaintiff's counsel therefore took nothing by their motion (a).

\* Vide post, vol. ii. p. 521.

(a) Sed vide *Oldham v. Carleton*, post, vol. iv. p. 88.

## TRINITY TERM.

25 GEO. III. 1785.

## POCKLINGTON v. BAYNE.

Power to appoint in such shares, &c. as *J. P.* should think proper, not exceeding estates tail: he appoints to two of his children *one acre* for life, then to fall into the residue of the estate, which he gave to his second son for life, with remainders over. This execution of the power is elusory and bad.

**BY** marriage settlement, dated 25th and 26th *May*, 1769, the manor of *Wanborough* and other lands were conveyed to trustees, in trust, for *Samuel Sharpe* for life, remainder to *Samuel Pocklington* the husband, for life, remainder to the wife for life, “remainder to the use of all and every the child and children of the body of the said *Samuel Pocklington* on the body of *Pleasance* his wife begotten or to be begotten, in such parts, shares, and proportions, and for such estate and estates, not exceeding an estate or estates in tail, with or without power of revocation, and by, with, and under such powers, provisoes, remainders, or limitations over to some or one of the said children as the said *Samuel Pocklington* should by any deed or writing, executed as therein mentioned, or by will direct and appoint, and for default of such appointment, then to all and every the children, to be divided share and share alike, &c.” *Samuel Pocklington*, by will duly attested, and reciting the power, did in pursuance thereof limit *one acre* of the premises to his eldest son *William* and his daughter *Ann*, for their lives and the life of the survivor, with remainder to such person or persons as should be entitled to the residue of the said premises, and then limited the residue to his second son *Henry* for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, with remainders over. The bill was filed to carry this will into execution.

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Mr. *Selwyn* and Mr. *Madocks* contended, that the power was not well executed. In the first place, *Samuel Pocklington* had no power to limit estates to his children for life only, for if he could limit them for life, with remainders over, it would tie up the property longer than the rules of law would allow. It is exactly the case of *Spencer v. The Duke of Marlborough*, 5 Bro. P. C. 592 (r) (a),—2dly. The giving two of the children *one acre* alone of the estate for their lives and the life of the survivor is merely elusory, and not within the intention of the person who created the power.—3dly. That he had extended the appointment to grandchildren, whereas his power was only to appoint to his own chil-

(r) See *Oaker v. Parrott*, Cas. temp. Finch, 354.

(a) Ed. Toml. 252. 1 Eden, 404.

dren; this is determined to be bad in the case of *Alexander v. Alexander*, 2 Ves. 640.

*Lord Chancellor* was clearly of opinion that the execution of the power intended by the testator was totally elusory, and contrary to the nature of the power; that therefore the estate must go among all the children agreeably to the direction in default of execution of the power \*.

\* This point has been since more amply discussed in the case of *Robinson v. Harcastle*, post, vol. ii. p. 22—344. also 2 T. R. 241.—781 (a).

(a) See also the Editor's note to *Robinson v. Harcastle*.

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POCKLINGTON

v.  
BAYNE.

(s) BELL v. WALKER and DEBRET.

Master of the  
Rolls for Lord  
Chancellor.

**M**R. Piggott moved for an injunction to restrain the defendants from publishing a book, entitled, "Memoirs of the Life of Mrs. Bellamy:" which the bill stated to be pirated from a book called, "An Apology for the Life of George Ann Bellamy." Affidavits were produced of Mrs. Bellamy being the author of this latter work, and that she had sold the property of the copy to the plaintiff, who had printed it in five volumes, which sold for 15s. The book against which the injunction was prayed was in one volume, and sold for 2s. 6d. Passages were read from each, to shew that the facts and even the terms in which they were related in this were taken frequently *verbatim* from the original work. His Honor said, if this was a fair *bonâ fide* abridgment of the larger work, several cases in this Court had decided that an injunction should not be granted. It had been so determined with respect to Dr. Hawkesworth's Voyages. He should not at present decide whether it was such, or a piracy from the former; but he had heard sufficient read to entitle the plaintiff to an injunction until answer and further order.

Injunction shall be against a publication piratically taken, from another, but not against a fair abridgment.

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*Motion granted (a).*

(s) *Dodsley v. Kinnersley*, Ambl. 403. *Carnan v. Bowles*, post, vol. ii. 80.

(a) Vide the Editor's note to *Carnan v. Bowles*, cit. sup.

1785.

Lincoln's-Inn  
Hall, 1st seal  
after Trinity,  
22d June.

Payment of  
money into  
Court.

## SHERWOOD v. WHITE.

**WHITE**, who is a half-pay lieutenant and resides in *North America*, by a letter of attorney empowered *Sherwood* to receive his half-pay. *Sherwood* received several sums upon that account. *White* was under the necessity of suing *Sherwood* for those sums. He obtained judgment, and was upon the point of suing out execution when *Sherwood* filed his bill in this Court, stating that he had deposited the sums received on account of *White* in the hands of *Brown* and *Collinson*, bankers, for safe custody; that *Brown* and *Collinson* had become bankrupts; that they had only paid two dividends, one of 5s. and another of 2s. in the pound. *Sherwood* by his bill admitted the receipt of these sums, and prayed that *White* might be compelled to accept them, together with an assignment of *Sherwood's* interest in *Brown* and *Collinson's* estate, in full of the debt owing to him by *Sherwood*; and that in the mean time an injunction might go to prevent *White* from suing execution.—An injunction was obtained for want of an answer.—Before the answer the Court was moved, on the part of the defendant, that the plaintiff might pay the money into Court, otherwise that the injunction should be dissolved. And the Court ordered that the plaintiff should pay the amount of the two dividends into Court, otherwise that the injunction should stand dissolved \*.

\* Vide post, *Acton v. Market*, vol. ii. p. 14. *Cullen v. Hickling*, vol. ii. p. 182. and the cases there cited, by which the rule seems to be completely settled as here determined (a).

(a) See also the Editor's note to the latter case.

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Lincoln's-Inn  
Hall, 23d June.

Bankrupt partners paying different proportions towards the debts shall have but one allowance, which shall be divided between them in the proportions their respective estates have paid.

*Ex parte BATE.*

**BATE**, the petitioner, and *Henckel* were partners, a joint commission of bankruptcy issued against them. The joint debts amounted to £22,766. 13s. 6d. the joint effects were about £5,000. *Bate's* separate effects amounted to above £30,000. The debts proved upon his separate estate were £15,894, of which £15,362 were joint debts due from the partnership. The joint creditors were paid 16s. in the pound, of which the petitioner (supposing the joint debts to be divided in moieties) had contributed 12s. 6d. and *Henckel* 3s. 6d. *Bate* now petitioned that the assignees might pay him the allowance of £10 per cent. (not exceeding £300) in respect of his separate estate, according to the statute of 5 Geo. 2. c. 30. and also for an allowance in respect of the joint estate.—The first

first question made was, whether the petitioner could have two allowances, the one in respect of the separate, the other of the joint estate; but *Lord Chancellor* was clearly of opinion this could not be. The next and principal question was, whether *Henckel* was entitled to any allowance, and if so, whether the same should be part of the £300 to which the petitioner would be entitled.

1785.

Es parte  
BATE.

*Lord Chancellor* thought the proper way of considering the question would be taking the debts as well as the effects in moieties. *Bate* therefore having paid in fact above 20s. on the moiety of the debts, although not quite 15s. on the whole, was entitled to the full allowance; but *Henckel*, who had not paid 10s. upon his moiety, was entitled to nothing. But this opinion his Lordship afterwards changed, for, a few days after, he declared that the bankrupts were entitled under the act of parliament to the sum of £300, being an allowance of 10 *per cent.* in respect of their joint and separate effects, and that the same ought to be divided between them, according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts (a).

(a) In determining the question of allowance, the joint and separate estate are not to be considered as distinct, and as if two commissions had issued: but the two estates are to be blended, to consider whether one allowance is to be made. Therefore a bankrupt under a joint commission was held not to be entitled to an allowance, though his joint estate paid 10s. in the pound, unless both joint and separate creditors who had proved had been paid 10s. in the pound. The same point arose in *Ex parte Styles*, 1 Atk. 208, but was not determined. So where

under a separate commission against one partner, and the usual order for keeping distinct accounts, the joint estate paid 18s. in the pound, and the separate estate 2s. the bankrupt was held not entitled to his allowance. *Ex parte Farlow*, 2 Ves. & Bea. 209. 1 Rose, 421; and a bankrupt under a separate commission paying 20s. in the pound to the separate creditors, is not entitled to his allowance against the right which the joint creditors have to the surplus under the usual order. *Ex parte Holmes*, 3 Ves. & Bea. 137. 2 Rose, 95.

*Ex parte HAYDEN.*

UPON a separate commission of bankruptcy against one partner, the joint creditors petitioned, and were allowed to prove their debts, and to receive a dividend *pari passu* with the separate creditors, there being no joint estate\*.

*Ex relatione (a).*

\* Vide *Cooke's Bankrupt Laws*, 292, S. C. also the case *Ex parte Hodgson*, post, vol. ii. p. 5.—*Ex parte Martin*, post, vol. ii. p. 14.—*Ex parte Page*, post, vol. ii. p. 119.—*Ex parte Flintum*, post, vol. ii. p. 120.—*Ex parte Copeland*, *Cooke's Bankrupt Laws*, 295, and other cases by him in his section of joint debts.

(a) See the modern doctrine upon this subject in a note to *Ex parte Flintum*, cit. sup.

Duke

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Lincoln's-Inn  
Hall, 24th June.

Joint creditors  
admitted to prove  
on a separate  
commission.

1785.

(t) Duke of ANCASTER v. MAYER and others.

Before the Lords Commissioners Ashurst and Hotham, 26th June, 1783.  
Before Lord Thurlow, June 16th, 1784. July 5th, 1785.

Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator, subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator.

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**CHARLES BERTIE** made his will, dated the 9th of November, 1759, and thereby devised as follows: "I give and devise to *Thomas Noel* and *John Mayer*, their executors, administrators, and assigns, all those my manors, lands, &c. in *Lincolnshire*, to have and to hold to them, from the time of my decease for the term of ninety-nine years, upon the trusts herein-after-mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to *Montague Bertie* for life, remainder to his first and other sons in tail-male, remainder to the plaintiff for life; remainder to his first and other sons in tail-male, with remainders over, and afterwards declared as follows: "I do hereby declare that the term and estate so as aforesaid limited to them the said *Thomas Noel* and *John Mayer*, their executors, administrators, and assigns, for ninety-nine years, is upon the special trust and confidence, and to the intents and purposes following; that is to say, Upon trust and confidence that they the said *Thomas Noel* and *John Mayer*, their executors, &c. shall, out of the rents and profits, or by mortgage, assignment, or demise of all or any part of my before-mentioned manors, &c. or any of them, for all or any part of the said term of ninety-nine years or otherwise, as to their discretion shall seem meet, levy and raise so much lawful money of *Great Britain* as will be sufficient to pay and satisfy all the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine." He then devised as follows: "I give and devise to my brother *Montague Bertie*, his executors and administrators, all that the manor of *East and West Deeping* holden by lease from the Crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon, to Mrs. *Millicent Neate*, of *London*, for £6,500; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease by virtue of the aforesaid limitations in this my will." And towards the end of his will he devised as follows: "Item,—I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother *Montague*

(t) Vide *Lord Inchiquin v. French*, and others, Amb. 33.

"Bertie,



“ *Bertie*, if he shall be living at the time of my death; but in case  
 “ he shall be then dead, I give and devise the same to such person  
 “ as shall be entitled to the freehold of my real estate under and by  
 “ virtue of the limitations in this my will: Provided always, and I do  
 “ hereby declare my mind and will to be, that in case I shall at the  
 “ time of my death leave issue of my own body, that then and in  
 “ such case, as well all and every the before-mentioned uses, de-  
 “ vises, and limitations to my said brother *Montague Bertie*, the  
 “ Duke of *Ancastra*, and their respective heirs, and also the devise  
 “ of the residue of my personal estate, shall be utterly void; and  
 “ in such case I do hereby will, and my mind is, that all my real  
 “ estate, subject to the said term of ninety-nine years, shall descend  
 “ according to the rules of law, and that the residue of my per-  
 “ sonal estate shall go and be distributed in such manner, and to  
 “ and among such persons as if I had died intestate. And I do  
 “ hereby nominate and appoint the said *Thomas Noel* and *John*  
 “ *Mayer*, executors of my last will; and I do hereby will, order,  
 “ direct, and appoint, that my said executors and the survivor of  
 “ them shall and do pay, satisfy, and discharge my funeral charges,  
 “ and all my debts and legacies as soon as they shall become due  
 “ and payable, by such methods, ways, and means, and in such  
 “ manner as he or they, or their counsel learned in the law, shall in  
 “ that behalf advise and think meet; and it shall and may be lawful  
 “ to my said executors, or either of them, to deduct and satisfy to  
 “ him or themselves out of my personal estate, or out of the monies  
 “ to be raised out of the said term of ninety-nine years before to  
 “ them devised, all such disbursements, expences, and charges  
 “ which they or either of them shall be put to in proving this my  
 “ will, or by any other ways or means whatsoever in or about the  
 “ execution of this my will, &c.”—*Montague Bertie* died in the  
 life-time of the testator, and the plaintiff became entitled, under  
 the limitations in the will, to the real estate. The leasehold estate  
 had been several years before mortgaged by the testator’s father for  
 £6,500 to *Mrs. Neate*, and in 1765, the mortgage was assigned by  
 the desire of the testator to *Sir Thomas Palmer*, who advanced the  
 testator a further sum of £100 on it, and the testator conveyed  
 other estates as an additional security for the £6,600.

1785.

ANCASTRA

v.  
MAYER.

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This cause was first heard before the late Lords Commissioners.

*Mr. Mansfield*, *Mr. Madocks*, and *Mr. Kenyon* for the plain-  
 tiffs.—There are three questions in this case. First, Whether the  
 personal estate is exonerated of the debts. Secondly, Whether the  
 mortgaged estate is liable to the mortgage. Thirdly, What interest  
 the Duke takes in the personal estate. As to the first, although  
 the personal estate be the original fund for the payment of debts,  
 yet the testator may discharge it against the devisee of his real  
 estate; and if his intent so to discharge it appear upon the face of  
 the

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the will, that intention shall govern. Here he has created a term for the payment of his debts, which sufficiently points out his intention. The cases shew that an intention so demonstrated is sufficient.—*Bampfild v. Wyndham*, Pre. Ch. 101, the testator providing a real fund for the payment of his debts, and giving (v) his personalty to his wife, it was held she should take it exonerated from the debts. *Wainwright v. Bendlowes*, 2 Vern. 718, devise for payment of debts and the personalty held exempt. In *Walker v. Jackson*, 2 Atk. 624, the personal estate was held to be a specific legacy, and of course exonerated. *Anderton v. Cook*, 4th June, 1775, *Thomas Calendar* gave several specific parts of his personal estate, he then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees in trust, to sell for the payment of debts, and in case that should not be sufficient to discharge the debts he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The Court held she took it wholly exempt from the debts.—In *Stapleton v. Colville*, For. 202, in *Holliday v. Bowman*, before Lord Bathurst, (ante, 145,) *Kynaston v. Kynaston**, and *Glede v. Glede*, the same doctrine has been held.—Secondly, The second point is, whether the mortgage shall also be discharged by the real estate. This point is determined by the case of *Searle v. St. Eloy*, 2 P. W. 386, which is recognised in *Galton v. Hancock*, 2 Atk. 487. Thirdly, The last question is, what interest the Duke shall take. He claims under the description of the person who should come into possession, and must take the same interest that *Montague Bertie* would have taken, that is the absolute interest.

Mr. Selwyn, Mr. Arden, and Mr. Aigne, for the defendants. As to the last question, we contend the Duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, With respect to the second, that the mortgaged premises must bear their own burthen.—As to the other, which is the principal question, it depends on the several clauses in the will. The first clause creates the term.—The next, which is material, is that by which he gives the personal estate.—The third, that appointing the executors, and directing them to pay the debts by such means as they should think meet. In this case there is no specific bequest of the personal estate. If he had meant the executors should pay the debts out of the term he would not have left it in

(v) As a specific bequest.

* The testator by his will charged his whole estates with payment of all his debts, legacies, and funeral expences, and for that purpose he devised particular lands to trustees, in trust to sell the same, and pay his debts, legacies, and funeral expences, and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate. Lord Bathurst determined the personal estate to be exempt.

their

their option how they should pay them. In order to exonerate personal estates from the payment of debts there must be an express direction that they shall be paid out of some other fund, or something tantamount to such express direction; but here is no necessary implication that the fund should be exempt. In *Bampfild v. Wyndham*, the debts were more than the amount of the personal estate. In *Wainwright v. Bendlowes*, the estate was ordered to be sold out and out. In *Bromhall v. Wilbraham*, at the Rolls, Nov. 1734, the testator gave all his personal estate to his sister, whom he made executrix, he gave his real estate to his brother, charged with his debts, but the personal estate was held to be first liable. In the case of *Lord Inchiquin v. O'Brien* (a), 8th Feb. 1744, before Lord Hardwicke, the Earl of Thomond by his will directed that all his debts should be paid: he devised his real estate to Lord Inchiquin and another in trust, that they should make sale of a sufficient part of the estate, and out of the money arising therefrom, together with the rents and profits, should in the first place pay all the debts which he should owe at the time of his death, and his legacies, and subject thereto he limited his real estate over: he gave Sir William Wyndham, £20,000, and some other legacies; then followed these words: "and this further will" "was, that the whole money to be raised by such sale should be" "taken as part of his personal estate:" lastly, he gave the rest and residue of his personal estate, whatsoever, after payment of his debts, to the defendant. The personal estate was first applied. In *Fereges v. Robinson*, Bunb. 301, the same doctrine was laid down, because, as the Court observed, there were no negative words to exonerate the personal estate. In *Stephenson v. Heathcote* (b), Harper devised lands to trustees in trust, by sale or mortgage to raise so much money as would pay all his debts and funeral expences: he then gave a silver tobacco-box to A. B. and gave all the residue of his personal estate to his wife, and made her executrix. Lord Northington ordered the personal estate to be first applied.

Lord Commissioner Ashhurst delivered the opinion of himself and Lord Commissioner Hotham.—The first question is, whether under the will of Charles Bertie, the plaintiff is entitled to the personal estate discharged of the debts.—Secondly, Whether the personal estate is the fund out of which the mortgages are to be paid. Thirdly, What estate the plaintiff takes in the freehold and personal estate.—The main question is, whether the plaintiff is entitled to the personal estate discharged of the debts:—the cases are determined on different grounds. *Adams v. Meyrick*, Eq. Ab. 271, which is in favor of the plaintiff, made the ground that the testator said that the trustees *do and shall*, by mortgage, &c. pay.

(a) This case is reported 1 Wils. 82. and 1 Cox, 1. and by the name of Lord

Inchiquin v. French, Ambl. 33.

(b) Since reported 1 Eden, 38.

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This is a very loose ground, and has been since abandoned. *Fer- ges v. Robinson*, in Bunb. 301, is the most sensible case. In *Walker v. Jackson*, 2 Atk. 624 (a), Lord *Hardwicke* says, the general rule is that the personal estate shall be first applied; but that against his devisee the testator may charge his real estate instead of his personal.—The personal estate must be first applied, unless there are express words or a plain intent to the contrary. The only question in every case of this kind is, whether you can satisfactorily find out whether the testator meant to exempt the personal estate from the debts, for there are no technical words by which it is to be done.—In this case, if it depended on the two clauses in the will, the intent could not be doubted, the trustees are to raise sufficient to pay all the debts. The next thing to be considered is, whether there is any thing in the latter part of the will to overturn this apparent intent.—It seems highly probable the word “residue” was thrown in without any meaning, or to give an option to the trustees out of which fund to take their expences, and that they might not be in advance.—At all events it excludes the idea that the charge was to fall upon the personalty. The more modern authorities have gone in exclusion of the personalty upon much less reason, *Anderton v. Cooke*,—*Holliday v. Bowman*, (ante, 145).—We think the Duke of *Ancaster* is entitled to the personal estate exempt from payment of debts. The next question is, whether it should be charged with the mortgages, and as to this point we are bound by the cases of *Searle v. St. Elroy*, 2 P. W. 386. and *Galton v. Hancock*, 2 Atk. 424. to decree that the mortgage must be paid out of the devised estate. The third question is, what interest the Duke takes in the personalty.—He took an absolute one, there is no need of express words for this purpose; it is beyond a doubt *Montague Bertie* would have taken absolutely; then, where the testator gives it by the description of the person entitled to the freehold, he does not state the interest so given to be a less interest than that of *Montague Bertie*.

A petition was presented for a rehearing, which came on before Lord *Thurlow* the 16th of *June*, 1784, the arguments used and the cases cited were a recapitulation of those before the Lords Commissioners.

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*Lord Chancellor*.—It would be highly advantageous to property if there was a settled rule where the personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken toward such a rule, by its being laid down that charging the estate in any way is not of itself an exemption of the

(a) S. C. 1 Wils. 24. Bunb. 302. n. Lord *Eldon* has observed, that Lord *Thurlow* commented much more upon

this case than appears in the present report.

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ANCASTER

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mal estate ; that the personal estate being the fund first liable, it is to be aided by either a legal or an equitable fund, it be itself in the first place applied. The question that next arises, whether a real estate being charged and the personal away, a presumption arises that this shall be exempted from debts. I never heard, till the arguments in this case, that a rule had been extracted from the authorities on the subject : the contrary I have always understood, that in order to exempt personal estate, the testator must express an intention so to (u) *although no particular form of words was necessary for the use.* I therefore take the rule *in primis* to be, that neither charge of the debts upon the real estate, or the gift of the real is sufficient of itself to exempt it. But it is indubitably that express words are not necessary to exempt the personal estate, the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption ; it must arise from the context of the will ; but with great deference to the opinion which has been given, I think there is not sufficient in *this will*. After giving his real estate the testator takes up the term, he places it before any of his other estates, and before his issue, so that he makes it to be a subsisting term for the payment of his debts. He gives his leasehold estate to *Montague Bertie*, but without any selection, for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare trusts of the term, which are to raise money to pay his debts and legacies, and after raising them the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estates in case he should have no issue. In the provision which he superadds he takes notice of the devise of the personalty, and calls it a residue, by which he makes it the devise of the personal estate after the specific bequest. He then provides that if he should die, leaving issue, the disposition he had made should fail : this was not essentially necessary, though apparently so. He then makes a general provision for the charge of the executors, who are also trustees ; so that it is clear that they are to act in the character of executors. It is also material to observe, that in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real which is settled in the utmost strictness. The question then is, whether any inference is to be drawn that he meant it should go with the burthen which he throws upon it, or it is to be presumed that it should be separated for the purpose of throwing that burthen upon the real estate, which he has given in the strictest manner. The

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(u) See *Webb v. Jones*, post, vol. ii. 61.

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inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone farther, for where he has given directions for the indemnity of his executors he has directed the expences to be taken out of either the personal or real estate. He has in that clause arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal: I should therefore think, if the rule were that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so: but I take the general rule to be the other way. I should have no doubt on the intention of the testator in this respect if there were not another point, which I think ought to undergo a further enquiry. I mean the mortgage of the leasehold estate. The case of *Searle v. St. Eloy*, went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent and had not been followed, I should have thought, upon the face of it, it was very open to argument.—The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but in the present case the debt of the father falls upon the estate in two ways, partly as being a charge, and partly as a debt upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of £6,000, and the estate on which it was secured; and as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

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The Master having made his report that the £6,000 was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer, the cause was again set down for argument the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

Lord Chancellor.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate to the payment of debts *in wills of this kind*, upon looking into the cases, I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that could the will of a testator be referred to a number of lawyers they would probably entertain a diversity of opinions upon it. The point ought to be fixed; and in order to make it so, I take it the rules have been these, and should be adhered to: in the first place, that the personal estate is *liable in the first instance to the payment of the debts*, but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or  
any



any other representative, clear of the payment of his debts; and then it becomes a question what is the mode of expression to give the personal estate *exempt* from such payment, when the rule of law is that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule down in *Fereges v. Robinson*, that the testator must use *express words* for that purpose, but it is impossible to abide by the opinion given in that case consistently with the rules in other cases. The second rule is, that where *there is a declaration plain* that shall stand in *lieu of express words*: this rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wise soever it might have been *originally* to have done so, it would be very unwise to make the *administration of justice* take a course contrary to *former rules*. Therefore if there be a *declaration plain*, or *manifestation clear*, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is not to disappoint but to carry such intent into execution (a). But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts. In regard then to the general intention of the will of *Charles Bertie*; the testator was seised of a real estate, which he had in his contemplation, (exclusive of the idea of his *own children*), and wished to leave it to other *lines of the family of Bertie*, and consequently devised it to *Montague Bertie*, with remainder over to *Peregrine Bertie* for life, &c. so far in respect of the real estate his intention was to *fix it* in the *name and blood* of the family. The next object he had in view was a leasehold estate which he held *under the Crown*; that estate was a chattel interest, and with regard to that he does not shew such a wish to fix and continue *that estate* in the line of *Bertie*: his *apparent wish* was not so strong as in respect to the disposal of his real estate; for had it been so, though he could not have created an entail of this leasehold estate with limitations over, yet he *might have prevented the first taker of it from alienating it*. Had the testator been asked the question whether he *meant* that this *part* of his estate should be subject to the mortgage, or to give it *entire* to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though perhaps he might have answered, *that that estate should pay the debts*: but whatever his intention was, he has *positively given it subject to the payment of the debt*, therefore if *another estate* had been appropriated to payment of his debts, and this had been *his debt* upon the estate, I should have concurred with the Lords Commissioners: but in following

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(a) As to the force and meaning of these and similar expressions, vide *Brummel v. Prothero*, 3 Ves. 113. *Booth v. Blundell*, 1 Meriv. 216. 219.

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them in that course, in which they considered it as being the clear intention in the mind of the testator that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it *should not*, and that he chose that the *leasehold estate* should be so appropriated rather than to have burthened the real estate. For the mode of limiting the estate to *Montague Bertie* for life implies the intention of giving him a *personal bounty*, but in case of failure of issue he gives it to the next heir who should come into possession, &c. Had the real estate been expressly charged with payment of the debts, or the testator shewn an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate for that purpose, by the mode of disposing of his estates such a circumstance might have been sufficient to have turned the rule of law, and it must have been appropriated to the payment of debts let him have charged it in any manner he pleased. When the testator purchased *this leasehold estate* he purchased the equity of redemption; and the mortgage was to be considered merely as a *real incumbrance* upon the estate itself, and not a *personal debt*, as against the purchaser, according to the rules of this Court and cases decided. For if a man purchases an equity of redemption subject to incumbrances, that shall be real incumbrance following the land, and not a *personal one*. The question is, whether by purchasing this estate, and assigning the mortgage from *Mrs. Neate* to *Hoare*, and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn v. Evelyn*, (2 P. W. 659.) never been decided, a fair argument might have arisen upon that head; because where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law he makes it his own debt, and makes himself liable to be sued upon that covenant, and such a debt *has priority before other simple-contract debts*. Now I do not know in what court or by what rule the debt would have followed the purchaser *personally*; but *Evelyn v. Evelyn* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the *incumbrance*, they shall be applied for that purpose: and it is to be understood with respect to such transaction, that the party did it by way of *accommodating* the charge, and not of making the debt his own. The difference between the estate *descended* and *purchased* is nothing, unless the *circumstance of purchasing* creates the difference; but that affords no argument. The next question is, whether when he mortgages *an estate of his own as an ulterior security*, that *circumstance would create a difference*, as if in *Evelyn v. Evelyn*, an *additional real fund* had been secured for making the debt good, that would have turned the judgment; it would not: for nothing makes it his debt so effectually as the *covenant to pay*, for it does not create the debt, but only operates as collateral to the debt: a man mortgages his estate without covenant, yet because the money was borrowed the mortgagee becomes

comes a simple-contract creditor, and in that case the mortgage is a collateral security, and if there is a *bond* or a *covenant* then there is a *collateral security* of a *higher species* but no higher by means of the mortgage merely; therefore having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was *not one of the testator's debts* and did not fall upon the *personal estate*, that they would have considered it as inherent to the leasehold estate. The argument of its *not falling upon the testator*, answers his *real intention better*. But as to the *real intention*, I should have agreed with the Lords Commissioners could that intention have been made clear; but the intention does not amount to a *declaration plain* in any sense in which these words have been properly applied. For the purpose of securing property, and the due administration of justice in a free country, judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment without applying to a superior tribunal.—It is a fixed rule that the personal estate must be first liable unless another fund is provided; the testator *must express his intention to discharge* that estate from the payment of debts. With regard to the intention apparent upon this will it is said such intention is most anxiously limited to the raising of the term of ninety-nine years; whether the expression be more or less it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a *declaration plain*, I should not have changed the force of those words; but the intent of these words as they stand naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a *degree of inference*; but constructions thus picked up, and collected from more circumstances than are necessary for the purpose are not good ways of finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay not only the *expence of the probate of the will*, which is expressly mentioned, but to pay all the *charges and expences* that should arise by proving the will, or by any other means, &c. How are these to be paid? *out of the personal estate?* or *the means* to be raised out of the term of ninety-nine years? they have authority to pay the whole out of the personal estate: an optional clause, and empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law *would have done*; he has made his personal estate first liable and then the term. The true ground upon which I proceed is not upon any

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any of these criticisms, but simply upon the rule of law, *the testator not having declared by express words, or any other declaration which would tend, in law, to the purpose of preserving the personal estate for any given purpose whatever.* As to *Adams v. Meyrick*, that depended upon the circumstance of the personal estate being a provision for the wife; and therefore the Court forced a construction upon the will, and it is, as Lord *Hardwicke* termed it in *Walker v. Jackson*, 2 Atk. 624, a *weak case*: in the latter case the re-publication of the will was an argument much relied upon. As to the cases determined upon the words, "rest and residue," I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determinations as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton v. Colville*, in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her, to charge either fund, there never was a *stronger case against charging the real estate*; for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his name and family, and yet charges it with the payment of the debts. Lord *Talbot* observed much might arise from the examination as to the *quantum* of the debts and the amount of the personal estate. Lord *Talbot* took it as clear that such an examination could be gone into. (x) In *Stephenson v. Heathcote*, it is said expressly no examination can be had(a). In that case Lord Keeper *Henley* relied much upon the wife being executrix: the case was this, that the testator gave all his real estate to R. and his wife for ever, with a charge thereon for payment of debts; and after disposing of other property, he gives a silver tobacco-box to his uncle, and all *the residue* he gives to his wife for ever, whom he appointed sole executrix. Lord Keeper's observation upon this case was, that the intent of the testator was to be collected from the words of the will and from no circumstances out of it, and upon general principles and rules established in the cases, that the Court could not go into the testator's circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only made his real estate an *auxiliary fund*; according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule: and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to shew his intention to give the residue *free from debts*, but that the primary fund should be liable.

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(x) So said by Lord *Hardwicke* in *Lord Inchiquin v. French*, Amb. 40.

(a) See the report, 1 Eden, 44, and also *Andrews v. Emmott*, post, vol. ii. the Editor's note to it upon this point; 297.

In

In the present case I am obliged to differ from the Lords Commissioners, and consider the *whole personal estate* as liable to the payment of the debts (a); and with respect to the leasehold estate, that the charge under which it came to the testator was prior to his purchasing it and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt (b).

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The judgment, *Ex relatione**.

* See on this subject the cases of *Parsons v. Freeman—Lewis v. Nangle—Forrester v. Leigh—Perkins v. Baynton—Wilson v. Earl of Darlington—Shafto v. Shafto—Basset v. Percival*—all cited and stated by Mr. Cox in his note on 1 P. W. 664; also the cases of the *Earl of Tankerville v. Fawcett*, post, vol. ii. p. 57; and *Tweddell v. Tweddell*, post, vol. ii. p. 101. 152.

(a) For the result of the cases upon the subject of exoneration of personal estate, vide the several notes of the Editor, to the case of *Stephenson v. Heathcote*, 1 Eden, 38. In the following cases the personal estate has been considered as not exempted. *Cutler v. Coxeter*, 2 Vern. 301. *Doleman v. Smith*, Prec. Chan. 456. *French v. Chichester*, 2 Vern. 569. *Hazlewood v. Pope*, 3 P. W. 322. *Lord Inchiquin v. French*, Amb. 33. 1 Wils. 82. 1 Cox, 1. *Samuel v. Wake*, ante, 144. The present case. *Gray v. Minnethorpe*, 3 Ves. 103. *Brummel v. Prothero*, ib. 111. *Tait v. Lord Northwick*, 4 Ves. 816. *Hartly v. Hurle*, 5 Ves. 540. *Bridges v. Phillips*, 6 Ves. 567. *Watson v. Brickwood*, 9 Ves. 447. *Aldridge v. Lord Walscourt*, 1 Ba. & Be. 312. *Tower v. Lord Rous*, 18 Ves. 132. In the following cases the personal estate has been considered exonerated. *Wainwright v. Bendlowes*,

2 Vern. 718. *Bamfield v. Windham*, Prec. Chan. 101. *Adams v. Meyrick*, 1 Eq. Ab. 271. *Stapleton v. Coleville*, For. 202. *Phipps v. Annesley*, 2 Atk. 57. *Bicknell v. Page*, ib. 79. *Walker v. Jackson*, ib. 624. 1 Wils. 24. *Stephenson v. Heathcote*, cit. sup. *Phillips v. Nicholas*, and *Holliday v. Bowman*, cit. ante, 145. *Anderton v. Cook*, *Kynaston v. Kynaston*, and *Glede v. Glede*, cit. ib. 456. *Webb v. Jones*, post, vol. ii. 60. 1 Cox, 245. *Williams v. Bishop of Landaff*, 1 Cox, 254. *Burton v. Knowlton*, 3 Ves. 107. *Gaskill v. Hough*, cit. ib. *Hancox v. Abbey*, 11 Ves. 179. *Bootle v. Blundell*, 1 Meriv. 193. *Gittins v. Steele*, 1 Swanst. 24.

(b) As to this vide *Tweddell v. Tweddell*, post, vol. ii. 101. *Billinghurst v. Walker*, ib. 604. *Hamilton v. Worley*, post, vol. iv. 199.

CAVENDISH v. CAVENDISH.

ELIZABETH CAVENDISH by her will, dated the 26th January, 1778, devised her house in *Piccadilly* to Lord George Cavendish, and in the same will was the following bequest: I give all my collection of gems, medals, and curiosities, together with the cabinet in which the same are usually kept, except such parts thereof as I shall hereinafter or by any codicil afterwards dispose of, to Lord Charles Cavendish, his executors, administrators, and assigns, upon trust to permit and suffer the same to be held and enjoyed by the person who shall be entitled to my said house in *Piccadilly*. She then gives to the Duchess of Portland an oval box, a snuff-box with a portrait, and several rings and seals; afterwards

S. C.
1 Cox, 77.
In Court, 7th
May, 1784.
Lincoln's-Inn
Hall, 8th July,
1785.
Ornaments of the
person do not pass
by a bequest of a
cabinet of curiosi-
ties, even though
occasionally
shewn with it.

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afterwards by a codicil, dated the 31st of January, 1779, she devised the house to *Dudley Long*, Esq. and gives her cabinet by the following description: "My collection, or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things (except as before excepted) hanging shelves, snuff-boxes, bust on the stair-case of Cardinal *Richelieu*, my Florentine cabinet of oriental stones in the second rooms, and the japan cabinet in the bed-chamber, formerly belonging to Lady *Elizabeth Wentworth* my late aunt, unto Lord *Charles Cavendish* and Lord *Camden*, upon the same trusts as before." She gave the residue to Lord *Charles Cavendish*, and made him and Lord *Camden* executors.

The question was, whether certain ornaments of her person (*viz.*) a diamond solitaire, a pair of ear-rings, a bow-knot, and some pearls, were or were not within the bequest.—To shew that they were, they gave evidence that those personal ornaments were shewn as part of her cabinet upon various occasions, that they were included in a book kept by herself and called an inventory of her cabinet, and insisted they were of the same kind with the things disposed of under the exception.—On the other hand, they read the evidence of persons in the trade as to the different sense of *gems* and *jewels*, that the latter meant stones set and prepared for wear, the former when kept for curiosity only.

Lord Chancellor said, he took it, things to pass under the will must be *ejusdem generis* with those expressly devised (a), that ear-rings and other ornaments of the person are part of the personal estate, not specimens of natural curiosities. Had Mr. *Pitt's* diamond been in the cabinet, in the light of a specimen of natural curiosities, it must have passed to the devisee, and therefore he thought the proper line of distinction was their being prepared for wear, if not worn; and directed an enquiry to be made with respect to the jewels being worn.

On the Master's report that they were occasionally worn, the cause came on before his Honour, sitting for Lord Chancellor, who was of opinion that that circumstance made the difference (b)(c).

Dismissed the Bill.

(a) Where words of devise or bequest are words of enumeration, and are followed by collective words, they must be applied to matters *ejusdem nature*. *Trafford v. Berridge*, 1 Eq. Ab. 7201. *Cook v. Oakley*, 1 P. W. 302. *Timewell v. Perkins*, 2 Atk. 102. *Roberts v. Cuffin*, ib. 112. *Boone v. Cornforth*, 2 Ves. 277. *Cave v. Cave*, 3 Eden, 145. *Doe v. Rout*, 7 Taunt. 79.

(b) For the cases upon bequests of jewels, plate, &c. vide *Earl of Northumberland's case*, Owen, 124. *Lillicott v. Compton*, 2 Vern. 638. *Franklyn v. Countess of Burlington*, ib. 512, and note to Mr. Raithby's edition. *Masters v. Masters*, 1 P. W. 420. *Kelly v. Pawlett*, Amb. 605. *Porter v. Townay*, 3 Ves. 311.

(c) Mr. Cox's report of this case is more

more full than the present, and contains the Master's report at length, and the several orders from the Register's Book, A. 1783. fol. 730. A. 1784. fol. 641. The above is erroneous, in stating that the dismissal of the bill upon the cause coming on upon the Master's

report was by the Master of the Rolls. The dismissal was by the Lord Chancellor after the report, and that order was affirmed by his Honour, sitting for the Lord Chancellor, upon a petition of rehearing.

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MOODALAY v. MORTON.

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The same v. The EAST INDIA Company.

Master of the
Rolls for Lord
Chancellor.
Lincoln's-Inn
Hall, July 8th.
Demurrer to a
bill against the
East India Com-
pany and their
secretary, pray-
ing a commission
to examine wit-
nesses in *India*,
and that the de-
fendants might
discover by what
authority plaintiff
was dispossessed
of a lease for
supplying *Madras*
with tobacco, (the
plaintiffs intend-
ing to bring an
action) over-ruled.

THIS bill was filed against the *East India Company*, and against *Morton* their secretary.—It stated that a cowl, or lease, of the permission to supply the inhabitants of *Madras* with tobacco for ten years had been granted to the plaintiffs, and signed *John Smith* (a person properly authorised by the Company) that the plaintiffs, as lessees, covenanted to provide the settlement at a reasonable price, and that tobacco being considered in the *East Indies* as a necessary of life, had been for time immemorial supplied to the settlements of the *East India Company* in this method. The bill further stated, that in 1782 (before the expiration of the ten years) the Company, by their servants in *India*, dispossessed the plaintiffs, and granted another cowl to other persons for the supplying of tobacco; and that the plaintiffs intend to bring an action against the *East India Company*, but cannot support the same without the evidence of persons resident in the *East Indies*; the bill therefore prayed a commission for the examination of witnesses; and that the Company and their secretary might discover by whom and under what authority the second cowl was granted, and for that purpose, might set forth letters, &c. of their servants in *India*, &c.—To this bill the defendants put in a general demurrer.

Mr. *Madocks*, Mr. *Hardinge*, Mr. *Nedham*, and Mr. *Lloyd*, for the plaintiffs.—The Court will retain a bill in aid of a legal title; the only objection which can be brought to the prayer of this bill, for a commission to examine witnesses, is, that the action at law is not yet brought, but that objection has been over-ruled. It is sufficient that a foundation for an action has been laid, by the plaintiffs being dispossessed by the Company's servants. The bill is for the discovery, whether the persons who have done the act, are servants of the Company; if they are not, they will be liable in their own persons: but it is impossible to learn whether they acted by the Company's authority, except in this way. In a case before Lord *Bathurst*, a bill was filed for a commission to examine witnesses in *India*, to prove an assault committed by Mr. *Verelst*. The action was not commenced, and the defendant demurred;

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demurred; but it was then held, that the circumstance of the action not being actually brought was immaterial, and the reason that the demurrer was allowed, was because the Court would not compel a discovery of criminal matter. In *Wych v. Meal*, 3 P. W. 310. it was held that the servant of a public Company should not demur to a bill of discovery of papers and orders, as the Company cannot be indicted for perjury, if their answer is false.

His Honor mentioned the case of *Egerton v. Mostyn*, where it was held, that before an action brought, a bill for perpetuating the testimony of witnesses could not be supported.

Mr. *Hardinge* replied to this, that in the case of *Egerton v. Mostyn* the trespass had been committed by a known defendant, here the bill was to discover by whom the trespass was committed. In *Heathcote v. Fleete*, 2 Vern. 442 (a), such a bill was held to be well brought.

Mr. *Attorney-General*, Mr. *Solicitor-General*, and Mr. *Mitford*, for the defendants.—There is no instance of a court of equity granting a commission to examine witnesses in a suit not existing, it is matter of discretion, not of right; a bill to perpetuate the testimony of witnesses cannot be brought until after the action is commenced, unless in cases where an action will not lie, as where it is apprehended that, after all the witnesses are dead, new claims will be made. Then as to the discovery prayed, it is not a discovery of the parties who have done the injury. The plaintiffs state, that *Smith* and others granted them the lease to supply the settlement with tobacco, and that they have been dispossessed, but they do not pretend that they cannot bring an action against the new lessees, which as they are in possession of the old lease, they certainly might do. But, by suggesting that the Company have papers in their possession, by which it will appear the dispossession was by their authority, they call upon the secretary to produce those papers. In the case cited from *Williams*, it was admitted that the Company, if natural persons, would be obliged to make the discovery, and therefore the party could call upon their servant; but in this case, it does not appear that the principals had any thing to do with the matter. In another view, this is a matter of great importance to the Company; for the grant of the lease, and the removal of the lessees are incident to their character as a sovereign power. It was an exercise of their dominion as such, and no act of sovereignty can be questioned in a bill here, or in a suit at law.

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(a) And see the next case to it, *Morse v. Buckworth*, ib. 445.

Master

Master of the Rolls.—At the outset I thought the cases of a corporation, and of an individual were different; but I am glad to have the authority of Lord *Talbot*, that they are not (a). In ordinary cases, when an action has been brought, the Court, as auxiliary to the remedy, will grant the commission. This is constantly done in the Exchequer in insurance cases. I admit that no suit will lie in this Court against a sovereign power, for any thing done in that capacity (b); but I do not think the *East India Company* is within that rule. They have rights as a sovereign power, they have also duties as individuals: if they enter into bonds in *India*, the sums secured may be recovered here. So in this case, as a private Company, they have entered into a private contract, to which they must be liable. If the discovery prayed were of a matter which would be *felo de se*, it would be improper to suffer any delay or expence; but here is a *prima facie* ground of action, the Company has put other persons in the way of doing the plaintiffs an injury. But it is said that no action has been brought. In addition to the cases cited on this part of the question, I remember one in point, that the commission may be before any action is brought. The discovery may be necessary, before the declaration can be drawn, if the suit be by original (which I believe it must against a corporation (c)); I think, therefore, the plaintiffs are entitled both to the discovery and commission.—Mr. *Solicitor* says it would be perilous, that the secretary should discover matters prejudicial to the Company; if any part of the letters called for are so, he need not discover those parts. In a case of *Walpole and Ellison v. White*, it was so ordered, that the discovery should be only of the parts of the letters which were necessary.

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MOODALAY
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MORTON.

Demurrer over-ruled.

(a) That to a bill for relief, a mere witness cannot be made a party, vide *Cookson v. Ellison*, post, vol. ii. 252. and the Editor's note to it. The exception made in *Wyck v. Meal*, cited sup. and followed by the present case, is stated by Lord *Redesdale*, Tr. on Pl. 185. and by Lord *Eldon*, (though he did not entirely approve of it) as so sanctioned by practice, as to be impossible to unsettle it. In the case of *Dummer v. the Corporation of Chippenham*, 14 Ves. 245. the principle was extended to a bill against a corporation who were trustees for a charity, making five of the members, including the bailiff,

parties, the bill charging a corrupt execution of their trust.

(b) Vide the case of *the Nabob of Arcot v. the East India Company*, post, vol. iv. 180.

(c) For the obvious reason that in a bill it is necessary to allege that the defendant is in the custody of the marshal; so also against hundredors on the statutes of Hue and Cry. Tidd's Practice, 25. 35. 81. 96. 108. 147. and as to whether a peer of parliament may be sued by bill, vide *Earl of Lonsdale v. Littledale*, 1 H. Bl. 267. 299. also 3 Bos. & Pul. 9. n.

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Lincoln's Inn
Hall, 14th July,
1785.

Testatrix gave
£500 stock in
long annuities to
A.—the same to
B.—£200 long
annuities, to C.
the interest thereof
to accumulate; an
enquiry admitted
into the state of
her property, to
shew she meant
such sums of mo-
ney, not annuities
of this amount.

(y) FONNEREAU v. POYNTZ.

THE testatrix, *Jane Malcher*, by will dated 8th of March, 1783, gave the following bequests: "I give to *Mary Poyntz* the sum of £500 stock in long annuities, I give to *Mary Haye* the sum of £500 stock in long annuities; I also give unto *Miss J. L. Barbauld* the sum of £200 stock in long annuities, the interest thereof to accumulate until she shall attain twenty-one, and then the whole to be transferred to her by my executors; also I give unto *Miss H. Dawson* the sum of £100 stock in long annuities, the interest thereof to accumulate until she attains twenty-one, and then the whole to be transferred to her by my executors. And all the rest and residue of my estate, and effects, both real and personal, whatsoever and wheresoever, I give, devise, and bequeath the same, and all and every part thereof, unto my said two nephews *Martin Fonnereau*, and *Thomas Fonnereau*, their heirs, executors, administrators, and assigns, for ever."—The bill was filed by the residuary legatees, that they might be paid the residue of the testatrix's estate, after payment out of it, of the several sums of £500, £500, £200 and £100, to the legatees; and upon the hearing in *Easter Term*, 1784, it being then stated that the testatrix had only £120 a year, long annuities, the question was, whether the legatees should have the respective sums given to them, raised by sale of so much of the stock as would produce same, or they were entitled, under the will, to annuities of the sums respectively given them, and of course must divide the whole of the testatrix's property rateably, leaving nothing to the residuary legatees.

Mr. Scott, for the defendants, argued, That these bequests to the legatees, must be bequests of annuities, the subject given not being stock, but an annuity. In *Stafford v. Horton*, a few days ago (post, p. 482. upon the rehearing) it was determined that where the first legacy was to one of £100 a year, long annuities, then a legacy to another of £50 long annuities, and £50 in long annuities to a third person, that the two latter took £50 a year each.

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Lord Chancellor.—The case is, there is no such fund as is described by the will. Where the words used by a testator are sensible, they must be taken as they stand; if not, the construction must be taken *aliunde*. The question here is, whether, the description being inapplicable, the legatee is to take £500 a year, or £500 is to be laid out for her in that fund. I am perfectly

(y) *Stafford v. Horton*, post, 482. *Finch v. Inglis*, post, vol. iii. 470.

conscious

conscious the testatrix meant only to give £500, it appears by the terms, she could not mean to give £500 a year. But I doubt whether evidence can be admitted to explain the words, which are very nearly those used in the receipt. If she had expressly given £25 interest, or share in long annuities, (the very terms of the receipt) it would have been very clear the legatee must have taken £25 a year, and the description, here, of stock, is the annuity itself, nothing else; and the sense of the words is describing the quantity of the annuity. But let it be referred to the Master to take an account of the personal estate of the testatrix, and, in particular, how much of it was in the long annuities, and reserve further directions till after the Master's report.

1785.

POWELL
v.
POYNT.

On the 8th June, 1785, the cause came on for further directions, the Master having reported that the testatrix, at the time of making her will, had only £120 long annuities.

Mr. Madocks argued for the plaintiffs, upon the manifest intention of the testatrix. Mr. Scott, for the defendants, upon the construction of the words.

Lord Chancellor.—It is perfectly clear, from the *data*, that the testatrix did not mean to give so much *per annum* to the several legatees, for she clearly meant a reserve of part of her fortune for the residuary legatees, to whose family she was under obligations: whereas, by the construction contended for, she has given away ten times as much as she had to give. Had her fortune been sufficient to have satisfied all the legacies, they must have taken place according to the words; but not being so, the difficulty is to lay down any rule for admitting evidence of the state of her property at the time, in order to construe the will against the direct and natural meaning of the words; although the intention of the testatrix appears perfectly clear, from other circumstances which amount to demonstration, that she did not mean them in that sense. If I could find out such a degree of ambiguity as the law has suffered to be explained by evidence, I should be very glad to do it. If it had been doubtful out of what fund the legacy was to arise, that would have been matter to explain by evidence; but, upon examining the receipt, she has used words so near the technical description, and so apposite to dispose of so much *per annum*, that I do not know what I can do, without going too far in point of precedent. It is a very hard case, but the words are too near those a man of business would make use of to dispose of so much *per annum*. I must therefore declare the legatees entitled, respectively, to their £500, £200, and £100 *per annum*, and they must abate in proportion.

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FOXNEREAU
v.
POYNTZ.

The manifest reluctance with which this judgment was given induced an immediate application, on the part of the plaintiffs, for a rehearing. The cause accordingly came on again, when Mr. *Mansfield*, Mr. *Madocks*, and Mr. *King*, argued for the plaintiffs; and Mr. *Scott*, Mr. *Mitford*, and Mr. *Grimwood*, for the defendants.

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For the plaintiffs, it was argued.—First, That this is a case in which parol evidence ought to be admitted. It is true the Court will not admit parol evidence to raise a title or gift; but where the title or gift is raised, and there is a doubt as to the person, or other circumstances, then parol evidence shall be admitted. In this case, there is a latent ambiguity, not arising from the words themselves, for they are clear, but with respect to their application. In the case where there are two persons of the same name, the doubt is with respect to the application. So, where there is nothing answering to the words, parol evidence is admitted. This is a case of that sort; there is no subject to which the terms of the will apply. Then it is precisely within the meaning of the several cases. In *Hodgson v. Hodgson*, 2 Vern. 593, Lord Chancellor said he saw no hurt in admitting collateral proof to make certain the person or thing described. In *Cuthbert v. Peacock*, in the same book, p. 594, he admitted the same, to explain the testator's intention that a legacy should not go in satisfaction. In 2 Vern. 252, to prove that the widow should have the personal estate free from debts.—So in *Harris v. the Bishop of Lincoln*, 2 P. W. 135. In *Ulrich v. Litchfield*, 2 Atk. 372, Lord Hardwicke laid down the cases in which courts of law or equity will admit parol evidence. First, To ascertain the person, where there are two of the same name, or where there has been a mistake in the christian or surname; and this upon absolute necessity, as in Lord *Cheyney's* case, 5 Co. 68, where there were two sons of the name of *John*, and if the Court had not let in the evidence, it would have made the will void.—The second is with respect to resulting trusts relating to personal estate, where a person makes an executor with a small legacy, and the next of kin claims the residue; in order to rebut the resulting trust, parol proof is admitted. In the present case, the testatrix had only £120 a year, which she had purchased at different times. According to the construction contended for, she will have disposed of £1,300 a year.—The surplus is given to the nephews, she clearly meant they should have something. This circumstance will let in the parol evidence of the value of the estate, according to the case of *Dyose v. Dyose*, 1 P. W. 305. In *King v. Philips*, 1 Ves. 232, Lord Hardwicke said, the legacy being so near the value of the estate, he would do what Lord *Jefferies* and Lord *Cowper* had done before, and accordingly directed an account of the value of the personal estate. So in *Cole v. Rawlinson*, 2 Lord Raym. 831. In 3 Burr. 1696, before Lord *Mansfield*, the value of the estate was taken into consideration. In

In *Milner v. Milner*, 1 Ves. 106, the intention being plain, the Court made up the whole sum (a). There are several cases of the same kind in *Swinburne*. The error, here, was in respect to the quantity. She did not mean £500 a year, but £500 to be laid out in that stock. Secondly, This construction is supported by the direction that the interest of the stock given to the infant legatees should accumulate.—The construction certainly must be interest of a gross sum, or of the original subscription, not of an annuity, which can produce no interest. There is no more a capital answering to the *5 per cents* than to these annuities. They were instituted at the same time, only one was redeemable, the other extinguishable. The receipt (which has been relied upon) is the same in both cases. It is called *joint stock of 3 per cent. annuities*: so that, according to the reasoning on the other side, if she had given £500, *3 per cent. annuities*, it would have been £500 a year; which nobody ever imagined.

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v.
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For the defendants, it was argued.—That admitting the parol evidence in this case, would overturn all the authorities from *Cheney's* case down to the present time. If it could be at all admitted, it could not be to the purpose contended for; but if, upon the face of the will, there was a latent ambiguity, to explain that, the evidence might be admitted. The fund itself, there being but one fund of long annuities, cannot raise an ambiguity. If there were two such funds they might, and there are cases, of that sort, where an election seems to have been given to the legatees, Lord Bacon's *Maxims*, rule 23 and 25; but, in that case, when you had explained by parol evidence, which was the fund, you could go no farther; the words of the will alone must explain the *quantum* of the fund given. All the cases are, either, where it was necessary to ascertain the thing given, or the object to take; neither of which can apply here, the words having accurately explained the stock. Another head of those cases is, where the evidence is to rebut a resulting trust, where the instrument has not explained the thing, but that cannot apply where the thing is accurately described, and, being so, cannot be explained by any thing out of the will. In *Green v. Howard*, (ante, 31.) your Lordship held the word *relations*, had been generally determined to be relations within the statute of distributions, and that you could not go out of the will. In *Kelly v. Paulet* (b), at the *Rolls*, Trin. 1763, where the late Duchess of Bolton bequeathed household furniture, and a question arose, whether plate passed, the person who drew the will said it was not intended, but the *Master of the Rolls* would not admit the parol evidence. There is no case where the Court has admitted

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(a) *Milner v. Milner* was merely a case of a mistake of the testator in calculation, rectified upon his apparent intent, vide *Brackenbury v. Bracken-*

bury, Amb. 472. 2 Eden, 275. *Danvers v. Manning*, post, vol. ii. 18.

(b) Amb. 605.

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evidence of the property, unless where the will refers to specific property and mis-conceives it, or where there is an ambiguity on the face of the will. In 1 Ves. 232, the evidence was not to prove the extent of the disposition. *Dyose v. Dyose* is quite distinct from this case; the will itself furnished the argument. It is a case by itself, and would not probably be so determined now. Parol evidence cannot affect this case, for if her property was not sufficient, it is only the common case of a party giving more property than he possessed. Secondly, As to the other parts of the case, the stock receipts are almost in the very terms used by the testatrix. And with respect to the interest being ordered to accumulate, the argument does not apply, the thing given being an annual sum, the word *interest* is inapplicable.—The words can receive no construction, but that of £500 a year.

Previous to *Lord Chancellor's* pronouncing his decree, Mr. *Scott* added to the cases he had cited, that of *Doe, dem. Hanson v. Fyldes*, Cowp. 833, where evidence of the value of the estate being offered and rejected at the trial, *Lord Mansfield*, on a motion for a new trial, held the evidence to be irrelevant.

Lord Chancellor.—So many cases, and the doctrines resulting from them, of so many various sorts, have been cited, that it would be rash for me to give an opinion upon *what is here reported*, being too much engaged at present, to afford leisure to examine the matter so thoroughly as I could wish. However, from what I can collect from the cases, as they have been cited at the bar, and according to my own recollection of them, I do not apprehend, that the ground of reasoning, respecting the law upon this point, is extremely difficult. With respect to the case now before me upon the Master's report, it is impossible to doubt, that *she did not mean* what the plaintiffs contend for; the construing this will in such direct opposition to what every body must observe the testatrix had in view, is what I must do with great reluctance; and the only question is, *how to preserve the law, and yet to decide according to the intention* of the testatrix. When it was first mentioned to me, I thought it totally impossible to admit evidence of her intention; and, upon maturer recollection, I may be biassed by what the testatrix meant, and may break into the principle of the law, which, for the wisest reasons, will not admit of an instrument being construed *aliundé*.—What shall we say then? for I lay out of the case, all *declarations* of the testatrix of what *she really meant to give at the time of making her will*, and all *statement of her property*, from whence it might be inferred *what she meant*. But, upon the other side of the question, it is a clear proposition, which Mr. *Mansfield* argued very amply, that every evidence, as to the description of the subject the testatrix has *described*, must be admitted. As in the case of a *specific* legacy, you must *hear evidence*

dence concerning the subject to which the will applies, in order to see whether the *description* applies aptly or not. It is impossible to deny that the statement of her fortune is external evidence. As to the case of *Dyose v. Dyose*, there was no ambiguity either latent or patent: there was a legacy of £3,000 a-piece given to the younger sons, the residue to the eldest; and the question was, whether the residuary legatee should have any thing or nothing, which, if not mixed with the affair of the executrix having wasted the assets of the testator, is a simple question, whether a testator giving a larger legacy than he is worth, and then the residue to another, there could be a residue. I cannot agree to the law of that case (a), for, in such a case, if the testatrix did not leave a residue beyond the value of the legacies, the residuary legatee takes nothing; so where the pecuniary legacies abate *inter se*, the residuary legatee takes nothing. And the law of the Court is, that the intention of the testatrix's making a specific bequest, or pecuniary legacy, cannot be controlled by the statement of her fortune. It has been much argued, that if she had given £500 in this way, "I give £25 stock in long annuities to A. £30 long annuities to B. and so on," having a fortune amply sufficient to supply a residue, not only in the general way, but for the particular fund of long annuities; that, in this case, the legacy should be only £20 or £30. But the annuities should answer the sum she really meant to give; therefore, if the construction of the will stood *unembarrassed*, it must go according to the idea of the stock, and mean £20 *per annum*. But the great difficulty occurs where the criticisms in these cases have let in evidence, which, if let in, shews the intention of the testatrix, beyond doubt, concerning the thing which the testatrix meant to dispose of, which is a certain portion of a joint-interest in the annuities of 1761. The manner in which she has done it, has been by giving M. Poyntz the sum of £500 stock in long annuities; and, upon enquiry, there appears to be no other stock of the kind; and therefore it must have been in her contemplation to give this particular kind of annuities. It cannot be contended, but that it was necessary to have laid before the Court the condition of that fund, of which she meant to give certain proportions, to see whether the *description* would apply to it; and, if it is a specific legacy, whether it does, or does not, amount to the *description* of a specific legacy; and although, not in all points, a specific legacy, so as to gain a preference; yet in point of *description*, it is so, being a gift of a certain sum of money. But it is said, on the other side, that it is a portion, a joint interest in a certain fund; and, therefore, it is necessary to ascertain the fund claimed by the legatee under the words of *description*. I should have thought, had it stood clear of all other criticisms, although not an accurate description of £500 joint interest in the

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(a) Vide similar observations of Sir W. Grant, in *Page v. Leapingwell*, 18 Ves. 406.

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annuities, yet it was a sufficient one of £500 stock in long annuities; at the same time, it is impossible not to observe that the expression, "*the sum of £500*," is going out of the way. But one does not call for accurate phrases, and, if the words are found to express the intention of the testatrix, that is sufficient, and if it had stood by itself, it is sufficient to shew what the words meant, (*an annual sum of £500*) "I do give and bequeath, &c." (repeating the clauses). The difficulty occurring is this, that she has been speaking of a sum of £500, which expression, if standing alone, ought not to be interpreted by any other context, but must take its whole complexion from the word *stock*: but if it stood with the context to admit of any other construction upon it, I must consider what the testatrix meant by the whole of the words, "*the sum of £500, &c.*" and the additional words, "*the interest thereof to accumulate.*" According to the natural sense of the words, "*sum of £500 given to A. at twenty-one, and the interest thereof to accumulate,*" I must suppose the first sum to be the *principal* sum, and the second the interest of that principal sum. It has been contended, that the word "*stock*" in the annuities, would not mean the annuity, because it would extend to the 3 per cents which are annuities, but, there, the stock is *denominative* of the *capital* sum; otherwise as to the long annuities, they are denominated so by the annuity, and the circumstance of their being both *annuities* makes it very probable, that if a person were to speak of it, as a *gross sum*, he would speak of the *stock*, and not of the annuity merely. So far practice may warrant, that if the words had ended merely with annuities, without speaking of interest, there would have been no necessity for evidence to have controuled them, but the second part of the sentence, "*and the interest thereof to accumulate,*" raises a doubt whether she *meant a sum, as producing interest, or the stock itself*. The term *interest* is not a proper phrase; but this is not a grosser inaccuracy than those in the rest of the will. The word "*transferred*" is relied upon as a *technical phrase*; but it weighs nothing, because the thing to be bequeathed, was *not the stock*, but *the produce of stock*, together with the stock itself. The interest, which is the growing produce of the legacy she meant to give, is to be laid out in order to accumulate: she must have meant by the word "*annuity*" *something*. There is no doubt, if the word *stock* had been left out, but the meaning would be, that the sum of £500 *was to be disposed of in long annuities, and to make a produce*, and that produce to accumulate, until the legatee should attain twenty-one. This being the *doubtful* interpretation, upon the face of the will, the question arises, whether the *state* of the testatrix's fortune is not applicable to the construction of the will. It appears, by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the *Fonnereaus*; considering then the situation of her fortune, it is perfectly inconsistent to say that she could mean to give *ten times more than*

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than she was worth in legacies. My opinion therefore is, that the judgment must be reversed; and that I can let in the evidence of the value of the estate, not to controul the bequests which the testatrix has made in words themselves distinct, nor to controul a bequest which she had made of a subject which she had accurately described; but because the words she has used in the description are, upon the whole of the context, uncertain, whether she intended it as the interest of a gross sum to accumulate, or £500 per annum: the peculiarity of this will furnishes sufficient doubt to warrant the admission of collateral evidence to explain it; and, if so, the statement of the testatrix's fortune, is applicable to the purpose of such an explanation.

The judgment *ex relatione* (a).

(a) From whatever cause the ambiguity proceeds, whether from a mis-description of the estate, or from a mis-description of the person, if there be a latent ambiguity, the parol evidence is admissible, per *Mansfield*, C. J. 3 Taunt. 133. As to admitting it to ascertain the person of a devisee, vide *Cheney's case*, 5 Co. 68. *Altham's case*, 8 Co. 155. *Harris v. Bishop of Lincoln*, 2 P. W. 135. *Beaumont v. Fell*, *ibid.* 140. *Baylis v. the Attorney-General*, 2 Atk. 239. *Ulrich v. Litchfield*, *ibid.* 373. *Castledon v. Turner*, 3 Atk. 258. *Goodinge v. Goodinge*, 1 Ves. 231. *Hampshire v. Pearce*, 2 Ves. 216. *Jones v. Newman*, Bl. Rep. 60. *Dowset v. Sweet*, Amb. 175. *Bradwin v. Harpur*, *ib.* 374. *Hussey v. Berkley*, 2 Eden, 194. *Garth v. Meyrick*, ante,

31. *Parsons v. Parsons*, 1 Ves. jun. 266. *Abbot v. Massie*, 3 Ves. 148. *Thomas v. Thomas*, 6 T. R. 671. *Priece v. Page*, 4 Ves. 480. *Doe v. Dancers*, 3 East, 303. *Smith v. Coney*, 6 Ves. 42. *Beachcroft v. Beachcroft*, 1 Madd. Rep. 430. As to admitting parol evidence to ascertain the subject-matter of the devise, vide *Pendlestone v. Grant*, 2 Vern. 517. *Hodgson v. Hodgson*, *ib.* 593. *Stephenson v. Heathcote*, 1 Eden, 38. *Baugh v. Read*, 1 Ves. jun. 259. *Selwood v. Mildway*, 3 Ves. 306. *Dobson v. Waterman*, cited *ibid.* *Whitbread v. May*, 2 Bos. & Pul. 593. *Doe v. Brown*, 4 East, 441. *Doe v. Oxendon*, 3 Taunt. 147. *Goodtitle v. Southern*, 1 M. & S. 299. *Doe v. Greening*, 3 M. & S. 171. *Sundford v. Chichester*, 1 Meriv. 653.

MACNAMARA v. JONES.

THE plaintiff Mrs. Macnamara, daughter of the late Arthur Jones, Esq. was entitled, under his marriage settlement, to a sum of £10,000. He by his will devised all his real estates to trustees to the use of his daughter the plaintiff for life, with remainders over, and ordered his personal estate to be laid out to the same uses. And the testator declared that all the annuities, &c. therein given, should be in full satisfaction for all demands the respective takers had upon him, except servants wages. Some copyhold lands (in which he had only an equity of redemption), devised by the will to the same uses, had not been surrendered by the testator to the uses of his will, and therefore descended to the

plaintiff, she must elect between the two. An equity of redemption in copyholds, passes by will without surrender.

plaintiff

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Hall, 18th July.

Testator devised to trustees to uses, under which his daughter was tenant for life; and directed that annuitants, under his will, should take in satisfaction of all claims upon him. The daughter had a claim of £10,000 under the marriage set-

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plaintiff as his heir at law; and the question was, whether she could take the £10,000 under the settlement, and the copyholds in fee as heir at law, consistent with the devise, or must elect between them and the benefits given to her under the will.

Lord Chancellor.—The question is, whether the money under the covenant is a demand she must release. Every thing bequeathed in a will is in general termed a legacy. Then the question is whether the testator intended, by the general words, to provide for the £10,000 secured by the marriage settlement. It is argued that he did not mean this; for that a legacy is not an annuity, but a solid sum. If the general fund had been given to her absolutely, it would have been a vain question; but he has so given his whole fortune, that as to her it operates as an annuity, with remainder to her children, and upon failure of them, to other branches of his own family. Therefore in every sense of the words, they extend to the daughter as well as to any other annuitant under the will. It was argued that if he had only devised the real estate to her, it would not have been a satisfaction for the sum secured by the covenant: but I know of no case that has decided that the rule does not extend to a devise as well as to a legacy. But here was a legacy of the personal fund to be laid out to uses, as to which she was a legatee; and it is impossible to distinguish her demand of the £10,000 under the covenant, from any other demand which would be barred. With respect to the copyholds, where the legal estate is not in the devisor he has no need to surrender them*. In this case he had only an equity, so that they pass by the will. She must therefore convey them to the uses of the will, and the £10,000 being within the compass of the will, she cannot take the benefits given to her under the will, but upon the terms of extinguishing her claim under the settlement. She must elect to take under the will, or against the will.

* The cases on this subject are collected in Mr. Cox's note, in his edition of P. W. vol. iii. p. 360 (a).

(a) So a *cestui que trust* may devise without surrender, *Carr v. Ellison*, 3 Atk. 74. but an heir at law before admittance cannot devise a copyhold descended to him, *Smith v. Triggs*, 1 Str. 487. nor can a devisee, not having been admitted, pass by will the legal

estate in the copyhold, *Doe, dem. Vernon v. Vernon*, 7 East, 8. nor is such a devise good in equity, *Wainwright v. Elwell*, 1 Madd. Rep. 627. see more as to this, *Lindopp v. Eborall*, post, vol. iii. 188.

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(2) STAFFORD v. HORTON.

HORTON, possessed of considerable personal estate, and particularly of £300 *per annum*, Bank long annuities, made his will, and among other things, devised as follows: "I give to my daughter *Priscilla Horton*, £100 a year long annuities. "Item, I give *Dr. Stafford*, (one of the plaintiffs) £50 long annuities. "Item, I give to *J. Blythe*, £50 long annuities, to be laid out in charity at his discretion." He also gave £20 to a servant, and then gave the residue to his wife, whom he appointed executrix. The wife died before the testator. Upon his death *Priscilla* the daughter, the defendant, took out administration with the will annexed. *Blythe* died, and *Stafford* and his wife, the plaintiffs, are his executors, who by this bill claimed £50 *per annum* long annuities, as given to their testator *Blythe*; and *Dr. Stafford* in his own right also claimed £50 *per annum* long annuities as given to him.

In Court, 3d of April, 1784.
Lincoln's Inn
Hall, 27th July,
1785.

Testator made his will and gave to his daughter £100 a year long annuities, he then gave to the plaintiff £50 long annuities, and to *J. B.* £50 long annuities. These legacies shall be £50 a year annuities.

The defendant in her answer swore that the testator was old and infirm, and gave instances of extreme weakness of intellect; and insisted that he intended to give to *Stafford* and *Blythe* only £50 each, to be paid out of the annuities. She stated that after the making of the will, she was shewn it, and asked whether she was satisfied; that upon answering in the affirmative, her mother told her she might; that her father had left very little from her, and explained to her the difference, that the annuities left to her were £100 a year, but the others only £50 each. And she further swore that the father at the time he made this will, destroyed a former one, in which he had given *Blythe* £100 in money to dispose of in charity, and gave as his reason for it, that he thought it too much to give away from his family.—He also said he had given the servant £20 that her legacy might not be subject to the fluctuation of the funds. The defendant filed a cross bill against the plaintiffs, to discover whether they did not know, by conversation with the testator, that he meant to give them only £50 each. To this bill they demurred, and the demurrer having been overruled, they by their answers said they did not know from any of his conversation, whether he meant to give them only £50 each, but that he had told *Dr. Stafford*, he meant to give a legacy to the poor of the congregation of dissenters in *Broad-street*, of which he (*Dr. Stafford*) then was and still is pastor.

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Mr. Mansfield for the plaintiffs.


Mr. Attorney-General and Mr. Price for the defendants.

(2) Ante, 472.

Lord

May, 1773, having by his will appointed the plaintiff *Mary* executrix of his will.—She proved his will, and took out letters of administration *de bonis non* and with the will annexed, of *John Wall*, of *Wirksworth*.—*Goodwin* continued to call in the securities of the first testator, and some monies arising from his estate were laid out upon fresh securities. About *August*, 1774, some of the annuitants under the will of *John Wall*, of *Wirksworth*, filed their bill against the defendant *Mary* and *John Wall* the elder, the co-executor with *John Wall*, junior, of *John Wall*, of *Wirksworth*, praying to have their annuities under the will. And in *June*, 1775, the present bill was filed by the plaintiffs against the defendant *Bushby*, (who in the interim had married the defendant *Mary*) his wife, and *Goodwin*, who was no party to the former bill, praying an account of the original testator's estate and effects, and application of them to the purposes of his will, according to their respective interests therein, and also praying an injunction against the defendants to prevent their receiving any more of the personal estate, and that a receiver should be appointed.—To this bill *Goodwin* put in his answer, and annexed schedules containing an account of the securities in his hands, and the monies paid by him, and the defendants *Bushby* and his wife admitted assets, and said *they were ready to come to such account, and apply the trust money as the Court should direct*. On the 9th of *May* a motion was made on the part of the plaintiffs, and it was ordered (by consent of the defendants) that it should be referred to the Master to take an account of the personal estate of the original testator, come to the hands of *John Wall* or the defendants; and that what should be found due should be answered by them, and that they should be enjoined from receiving further sums, and a receiver appointed for that purpose. In consequence of this order, *Goodwin* paid the balance in his hands into the Bank. Several motions were afterwards made, and the plaintiffs went on (notwithstanding the admission of assets) to take an account of the effects of the original testator, and the Master made a general report of the sums received by the defendants, and afterwards by the receiver, which report was afterwards ordered to be reviewed, and a number of applications made to the Court, by which the cause was greatly protracted. In the mean while several of the securities taken originally by the testator, and by the defendants, upon placing out sums in their hands, proved bad, by which the assets of the testator became insufficient to answer the purposes of his will. And the cause now came on, upon the Master's report for further directions, upon the question whether the estate of the testator turning out to be insufficient, the defendants *Bushby* and his wife were bound by their admission of assets to make good that deficiency, or the same was waved by the plaintiffs having gone on to an account before the Master.

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Mr. *Madocks* and Mr. *Hollist*, for the defendants.—Although the admission of assets would have made the executrix, in the first instance, personally liable, the conduct of the plaintiff, in proceeding to an account before the Master, and obtaining a receiver to be appointed, has waved that remedy. By this mean they have taken the management of the assets into their own hands; and it is impossible that they can take the conduct of the assets, and make the defendants liable for them, on account of their prior admission.—The appointment of the receiver was a flat contradiction to the admission of assets, and is a discharge of the executrix from her office.—The assets at the time appeared to be more than sufficient to pay the debts by above £1,000 during the conduct of them in other hands, some of the securities have proved deficient, and the costs of the suit have amounted to £630. It would be unjust, with respect to the defendants, to suffer the plaintiffs, after this long delay, to have recourse to the original admission of assets. There are cases that the admission of assets does not bind the party admitting them to every extent; and on the other hand, that it will not preclude the other party from an account, as otherwise the admission of an insolvent executor might defeat all attempts of the creditor or legatee to obtain the assets. In *Norton v. Turvill*, 2 P.W. 145, the admission of one executor did not preclude the account against the others. In *Holt v. Holt*, 1 Ch. Ca. 190.—1 Eq. Ab. 85, the executors had entered into a recognizance, and losses happening which diminished the fund, it was held the recognizance was only a security for the assets remaining after the losses.—In *Horsely v. Chaloner*, 2 Ves. 85, it is said, that on certain circumstances, the Court will not pin down an executor by the admission of assets, as in the case of the money being in a banker's hands. The best bank in *England* may fail, and that undoubtedly will not bind him. The conduct of the assets would certainly be a waiver of the admission if all the parties were adults; here some of them are adults, and some are infants, but the infants are also bound by the act of the Court, by which the account (on the consent of the parties) was ordered to be taken.

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Mr. *Price*, for the plaintiffs.—This is the case of a direct admission of assets; but it is said the plaintiffs have waved the admission by their mode of proceeding: but why should the application that an executor who has received part of the fund, and seems likely to prove insolvent, should be restrained from receiving more, be a waiver of the admission of what he has already received? The application for a receiver is for the purpose of preserving the assets, which is equally beneficial to the defendant, as universal heir, as it is to the plaintiffs or legatees. The case of *Holt v. Holt*, that a party entering into a recognizance upon an idea of a sufficient fund shall not be answerable if the fund prove deficient, seems to be doubtful law, and to be contradicted by *Keyling's case*, 1 Eq. Ab.

229; there the testator's estate consisted of *East India* stock, which he ordered to be converted into money, and the executor conceiving it to be amply sufficient to pay, gave bonds to the legatees, but kept the stock until it fell so low as to be insufficient; he then brought his bill, that the legatees to whom he had given bonds might abate, but the Lord Keeper refused to give him any relief as to those who had bonds, and as to the other legatees, he was to answer for the stock at the price it bore at the end of twelve months from the testator's decease.—This case is an answer also to that of money in a banker's hands.—So in the case of *Roberts v. Roberts*, before the late Master of the Rolls.—The bill was filed by a single legatee against the executors for his legacy, the executors admitted assets, the bill was afterwards dismissed for want of prosecution; the legatees filed a second bill, in the answer the executor took notice that in his first answer he had admitted assets, but stated that by losses which had happened since the fund had become insufficient: his Honour held him to be bound by his first admission of assets, and upon an appeal to the present Lord Chancellor, he affirmed the decree, observing that the executor in his second answer only stated generally a deficiency having taken place since his first answer, without mentioning the particulars; he added at the same time, that a case might be made out which would enable the Court to relieve the executor from his admission of assets, but it must be a very strong case.

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Lord Chancellor.—The single question remaining in this cause is, what shall be the effect of this kind of decree made without any regular form of hearing. The bill is filed by the legatees of *John Wall*, against *Bushby* and his wife, as executrix of *John Wall* the younger, and administratrix *de bonis non*, of *John Wall* the elder; and also against *Goodwin*, who was neither executor nor administrator, but had received some part of the effects. It was admitted by the answer that there were assets to pay the legacies; several adults and several infants are concerned in the claim. A motion was made for an injunction to restrain the defendants from receiving any part of the effects then outstanding, and that a receiver might be appointed to get in the further effects, and the mortgages be delivered into his custody for that purpose. Upon the coming in of the defendant's answers, the plaintiffs might have set down the cause upon the bill and answer, and might have taken a personal decree against the defendants for their demands; but the plaintiffs thought proper to make the motion, and the decree was taken by the consent of *Bushby* and his wife, and of *Goodwin*, who was bound only in consequence of the effects he had received. I will not say but a case might be made, when the fund appeared to be in danger in the hands of the executors, that the Court would take the assets out of their hands, notwithstanding they had admitted assets:

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assets (a): but in the present instance, it was proposed and agreed that the decree should be taken in the form it was. Mr. *Madocks* considers the case as if all the parties were adults: then the question is, what difference arises from some of them being infants. The Court does not usually make any decree by consent, where infants are concerned, without referring it to a Master, to enquire whether it will be for their benefit; but when once the decree is pronounced, without that previous step, the authority is the same as if it had been referred to a Master, and he had made a report that it would be for their benefit. So an order for maintenance, though usually made upon a reference to a Master, if made without, would be equally binding. This circumstance is therefore out of the case; in the case of adults, the effect of this decree is not merely to restrain the defendants intermeddling with the outstanding effects, but it stands as if no such motion had been made, and as if the application for the decree had been upon the record. The plaintiffs might be afraid, if they took a decree upon the admission of assets, that the personal fund of the executors might not be sufficient, especially as no decree could have been made against *Goodwin*, who was only the agent of the executors: it probably would have been unwise to have done so. They took a decree therefore as if there had been no admission of assets, and as if *Goodwin* had been a principal accountant; it proceeds to direct a full and general account from all parties, and requires the executrix and *Goodwin* to pay what they and *Wall* had received. It turns out that a part of the receipts had lain in the hands of *John Wall* the younger, unemployed, and the consequence of this was one of the sharpest modes of procedure that can be against an executor, that of making him liable for the interest or produce, which accordingly has been paid to a great amount. The Court having taken upon itself the management of the fund, and the fund having then been sufficient, but by means of the ulterior demand, arising from the length of this process, become deficient, brings it to the single question, whether a plaintiff who is entitled to a personal decree, but who chooses to take an account, shall afterwards recur to the admission of assets to found a personal decree.—I thought at first that the admission of assets would bind the executor in every stage of the cause; but I now think the decree they have taken perfectly inconsistent with the personal decree they might have had, and that they have made an election by which they are bound; and that the circumstance of there being infants concerned will make no difference, but that they are bound by the act of Court, which proceeded on the idea that it would be for their benefit: the plaintiffs must therefore stand upon the decree of 1776, the legatees who are unpaid must abate in proportion, and the executors must stand in the place of those

(a) Vide *Anon.* 12 Ves. 4.

who

who have already been paid, and abide the loss upon such abatement (a) (b).

(a) Lord Alvanley, in the case of *Hoovey v. Blakeman*, 4 Ves. 606, mentions a very hard case of executors being bound by an admission of assets. It occurred in the cause of *Tew v. Lord Winterton*, which, as to other points, though not to this, is reported, post, vol. iii. 489, and 1 Ves. jun. 451. Executors of a receiver had admitted assets: an enquiry was directed what was due for interest, and the answer was considered an admission of assets for whatever should be due from the testator in his character of receiver, though the defendants objected that they had no idea of interest being charged.

(b) It is an invariable rule that an order by consent cannot be gotten rid of but by consent. *Northcote v. Northcote*, Colles, P. C. 287. 2 Eq. Ab. 279. 7 Vin. Ab. 398. *Harrison v. Rumsey*, 2 Ves. 488. *Anon.* 1 Ves. jun. 93. *Bernal v. Marquess of Donegal*, 3 Dow. P. C. 133. *Noel v. Godfrey*, cit. ib. 140, but where proceedings are taken in a cause by a party, if those proceedings are not consistent with the execution of that order to which he alleges, all parties have consented, he will be considered as having waived the right to insist upon the rule, ib. 146.

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(a) NOWLAN v. NELLIGAN, his Wife, and Others.

Lincoln's-Inn
Hall,
5th August.

NOWLAN, the father of the plaintiff, (who was an infant) being about to sail for the *East Indies*, made a testamentary paper in the following words: "I give and devise to my beloved wife *Harriot Nowlan*, all my real and personal estate; I make no provision expressly for my dear daughter (the plaintiff) knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my said wife, in that case, I hereby request my friends *Staples* and *Hunter* to take care of, and manage to the best advantage for, my lovely daughter *Harriot Nowlan*, all and whatsoever I may die possessed of." The testator died in his passage to *India*. The executors proved the testamentary paper, and got in his personal estate to the amount of £7,947. 10s. with which they purchased £11,000 4 per cent. annuities. The mother afterwards married the defendant *Nelligan*, and by a settlement previous to that marriage, £5,000 part of the £11,000, 4 per cent. annuities, were settled to the use of the plaintiff at twenty-one or marriage, and the remaining £6,000, upon the defendants, and the children of that marriage, and there was a covenant to secure the outstanding property of the former husband, one-third thereof to be to the use of the plaintiff, and the other two-thirds to the use of the defendants and their children.

Testator gave his whole property to his wife, making no express provision for his daughter,—
"but, in case of death happening to his wife, desired his executors to take care of the whole for his daughter."
The wife shall have the whole for life only, with remainder absolutely to the daughter.

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(a) *Foster v. Williams*, Pre. Ch. 78.—*Lord Douglas v. Chalmers*, 2 Ves. jun. 501.

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The present bill was filed by the plaintiff, praying that the £5,000 and £6,000, 4 *per cent.* annuities, might be transferred, and the rest of the testator's property secured to the use of the plaintiff, subject to the life estate of her mother, and be declared, subject to such life interest, to belong to the plaintiff.—The defendants by their answers, insisted that the whole property vested absolutely by the testator's will in the wife, and that the settlement made by them in favor of the daughter was a mere voluntary settlement.

The cause came on to be heard in *Easter Term*, 1782, when,

Mr. *Morris* and Mr. *Scott*, for the plaintiff, argued that the words of this testamentary paper were sufficient to raise a trust for the daughter in the whole of the testator's property, subject to the wife's life interest. That this was a similar case to those where the words *hoping, desiring, confiding*, had been made use of. The words *I make no provision*, meant only during the wife's life, the testator trusting to her care and affection; but now that she was married again, it was peculiarly incumbent upon the Court to protect this property for the child by the former marriage. They cited *Harding v. Glyn*, 1 Atk. 469.

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Mr. *Attorney-General* and Mr. *Mansfield*, for the defendants, admitted that a party may, as in the case of *Harding v. Glyn*, leave his property, with such a direction as should control the discretion of the devisee; but contended that the words here, *I make no express provision*, shewed it was not the intention of the testator so to do, but to intrust the whole to the care of his wife. They cited *Harland v. Trigg*, (ante, 142.) as a case where such direction had been over-ruled.

Lord Chancellor said, that he determined the case of *Harland v. Trigg* upon the ground of its being impossible to distinguish the object for whom the testator intended his estate; not from the words being insufficient to raise a trust, had the object been certain.

The counsel for the defendants then contended, that the words *in case of death happening to my said wife*, meant in case of her decease in the testator's life-time, or before he had made any other disposition of his property, in all other events he trusted his wife would provide properly for the daughter, and in this expectation he had not been disappointed, since she had made a provision of £5,000 for her at twenty-one or marriage, instead of making her wait till her own death for any part of the fortune.

Lord

Lord Chancellor observed, that in the case upon the *Duchess of Buckingham's* will the argument was, that although the words were those of civility and confidence, yet they bound the property as much as if they had been more obviously obligatory. But he said that in this case the prior words expressly controled the subsequent ones. It being necessary that some accounts should be taken before the Master, *Lord Chancellor* did not determine the point, but reserved it till the Master should have made his report.

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The cause came on again before his Lordship this day for further directions, when, after a very short argument, in which it was suggested by the counsel for the plaintiff, that it might be proper not only to secure the property, but to give her an allowance for maintenance during the wife's life-time :

Lord Chancellor said, that it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine, that *in case of death happening*, meant dying in the husband's life-time, that therefore the meaning must be supposed to be in the event of her death, whenever it should happen (a). His Lordship therefore directed the whole fund to be transferred to the accountant-general, the whole annual produce to be paid to the defendants, so long as they should continue to maintain the plaintiff, with liberty to her to apply if they should discontinue such maintenance*.

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* Vide *Pierson v. Garnet*, post, vol. ii. p. 38—226.

(a) Vide *Billings v. Sandom*, ante, 393, and the cases cited in the Editor's note to it.

—◆—
READ v. CROP.

WILLIAM BALCHEN by his will, 24th June, 1765, devised "All his freehold and copyhold estates, situate at *Royden, Thorley, Epping, and Witham*, in the counties of *Essex and Herts*, (which copyholds he had surrendered to the use of his wife,) and all other his freehold and copyhold estates" to *Crop and Tapp*, in trust, for his wife for her life, and after her death in trust, to sell the same, and divide the produce among his children in the manner directed. The testator at the time of his death was seised in fee of a copyhold estate at *Witham*, and also of a moiety of an estate at *Thorley*, to the other moiety of which his wife was entitled in her own right. She was also seised in fee of two copyhold estates in *Roydon* and *Epping*, but in these places the testator had no property whatsoever.—He had no other real estates.

S. C.
11 Serj. Hill's
MSS. 263.
Lincoln's-Inn
Hall,
8th August.

Testator devised all his estates in different places (which he had surrendered) to his wife for life, with remainders over. In some of the places he had no estates but in right of his wife. These did not pass by the will, and do not put the wife to an election.

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For the plaintiffs it was contended, that the testator having taken upon himself to devise his wife's estate, although the devise could not be maintained against her, yet if she disputed it, she must forfeit every devise in the will in her favor. She must therefore make her election, either to abide entirely by the will, or to take nothing by it.

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On the other hand it was said, it did not appear that he meant to devise his wife's estate; that although he had surrendered his own estate, and knew that was necessary to its passing, he had not attempted to surrender the other estates, and therefore certainly had no intention of devising them. He had not recollected, at the time of making his will, the respective rights to the different estates of which he was in possession; and therefore had used words of sufficient extent to pass all.

Lord Chancellor.—In *Thorley* the testator had a moiety of the estate together with his wife. He did not intend to devise her moiety, for he describes what he meant to devise by the words *his estate which he had surrendered*. He had not surrendered any of his wife's estates, so that they could not pass by the devise. The words are too loose to raise the construction contended for. It is not like any of the cases which I remember of election (a).

(a) As to the cases upon the doctrine of election, vide *Pearson v. Pearson*, ante, 292. *Freke v. Lord Barrington*,

post, vol. iii. 274. *Blake v. Bunbury*, vol. iv. 21.

APPENDIX

OF

CONTEMPORARY CASES.

APPENDIX (a).

FLETCHER v. ASHBURNER.

Rolls,
June, 1779.

JOHN FLETCHER, by his will devised his burgage houses and free rents in *Kendal*, and all his personal estate to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust, to sell so much as should be sufficient to pay his debts, and then to permit his wife *Agnes* to enjoy the residue during her life, if she so long continue his chaste widow; and after her decease to sell and dispose thereof, and the money arising thereby, after deducting charges, and half a guinea each to the trustees for their trouble, to pay to and between his son *William* and daughter *Mary*, share and share alike; provided that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son *William*, and daughter *Mary*, share and share alike, equally, and in case either his son *William* or his daughter *Mary* should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them: the testator died, leaving *Agnes* his widow, *William* his only son and heir at law, and *Mary* his daughter; *Agnes*, by the custom of burgage-tenure, was entitled to hold the burgage houses in *Kendal* during her chaste viduity, against the disposition of her husband by will; *Mary* attained twenty-one, but died unmarried in the life of her mother and brother. *William* was twenty-one at the death of the testator, and died without issue in the life of his mother; the mother died, the widow of the testator; upon her death a bill was filed by the heir at law of *William* and *John* the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir at law. The representative of the widow, who was the sole next of kin of *William* the son,

Where a real estate is ordered to be sold, and is blended with personal property, it becomes personalty, and shall go accordingly.

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(a) The cases contained in the following Appendix, as is well known to the profession, were printed from MS. notes of Lord Redesdale; and it has

been frequently stated, that they were published without the permission of the noble owner.

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by answer claimed the property as personal; alledging, that by the direction to the trustees to sell the real estates they become as personal property, and as such, were to go to the personal representative of *William* the son, who survived his sister.

The cause was heard the 11th *December*, 1778, where the first objection taken was, that the personal representative of *William* was not before the Court.

But the Master of the Rolls was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party, and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Madocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go the real, not the personal representative: that it was clearly the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person; that he directed it to be sold merely for the purpose of a division; that in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and from thenceforth, the son alone becoming entitled upon the death of his mother, it was to be considered as land, they relied upon the case of *Flanagan v. Flanagan*, 8th *June*, 1768, before Lord *Camden*, which was a devise of real and personal estate to trustees, in trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts, the surplus, after payment of debts, to *A*. A suit was instituted for payment of the debts, and the real estates decreed to be sold: part was sold; and afterwards *A*. died, leaving a son and daughter, the cause was revived against the son, and it being apprehended that sufficient was not sold to pay the debts, a further part of the real estate was sold under the order of the Court. It afterwards proved that the money produced by the first sale was sufficient to pay the debts; the question was, whether the heir or the personal representative was entitled to this money; it was alledged by Mr. *Wilson*; who cited the case, that Lord *Camden*'s determination was, that whatever quality the fund then had such it should retain; and he decreed for the personal representative: the other cases mentioned were *Cruse v. Barley* and *Banson*, 3 P. W. 20. *Digby v. Legard*, before Lord *Bathurst* (a).

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Mr. *Kenyon* and Mr. *Chambre* (on behalf of the defendants, the executors of the widow) contended that the testator had by his will

(a) 2 Dick. 500.

directed

directed the real estate, after the death of his widow, to be sold, and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan v. Flanagan*, it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made, and the property to be changed for payment of debts; the cases of *Digby v. Legard*, and *Cruse v. Barley* and *Banson*, were treated as inapplicable to the present case, being cases of lapsed devises, *Durour v. Motteur*, 1 Ves. 320, and *Mallabar v. Mallabar*, For. 79, were cited, as decisive of the question in favour of the defendants.

In June, his Honour gave his opinion; he observed that nothing was better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple v. Bindon*, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the courtesy, and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed; so that something has resulted to the heir at law, as in the case of *Emblin v. Freeman*, Pr. Ch. 541, and *Cruse v. Barley* and *Banson*, 3 P. W. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir at law of the testator. The case of *Durour v. Motteur*, 1 Ves. 320, is a strong case to the point now before the Court; and if any thing could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour v. Motteur*, Lord Hardwicke made this a principal ground for considering the whole fund as personal estate: in the present case it might be uncertain, till the death of the widow, whether the estates must

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must not be absolutely sold: both the children indeed died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother. There could be no election to take the fund as land or money; for where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold; the question therefore is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir at law shall take it as if no will had been made. The case of *Flanagan v. Flanagan*, is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, *Sarah Wooley*, by will, dated 28th March, 1749, gave and devised all her real and personal estates to *Francis Plumtree*, in trust, in the first place, out of her personal estate, as far as it would extend, and in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof, in trust, to convey the residue of the real estate, which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father *James Flanagan* and her brother *James Flanagan*, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate for payment of debts; and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to *James Flanagan*, the father, and *James Flanagan*, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs equally: after the decree *James Flanagan* the son died, leaving a daughter, and a son born after his death; part of the estate was sold, and afterwards *James Flanagan* the grandfather died, leaving his grandson his heir, and his grandson and grand-daughter his sole next of kin: after the death of the grandfather a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared however that the produce of the first sale was sufficient. A bill was afterwards brought by the son of *James Flanagan* the son, claiming a moiety of the surplus, as the real estate of *James Flanagan* the grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of *James Flanagan* the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered

as improperly made : that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby v. Legard* is a different question. There the testatrix (*Elizabeth Byerly*) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (*Lady Cayley*) died in her life-time. It was resolved that the devise, so far, failed totally, and should accrue to the heir at law. The language of the decree is such, that the benefit of the devise to *Lady Cayley* should accrue to the testatrix's heir at law, *Mr. Jervoice*, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore v. Scudamore*, Pr. Ch. 543, shews that, in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of *Ogle v. Cook*, (a) heard 19th February, 1748, which was this : *Mr. Ogle* made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have £1,000 more than the other : he gave the residue of his personal estate in the same way : he afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust, to sell so much as should be necessary to pay the debt, and as to the residue, in trust, for *Mrs. Ogle* : part of the estate was sold, and then *Mr. Ogle* died. His youngest daughter died in his life-time. The bill was brought by the widow and the eldest daughter against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of *Mr. Ogle*, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will ; and, if not, that the share of the dead daughter was to be considered as real estate of *Mr. Ogle*, and descended to him as heir. It was determined that the conveyance was a revocation only *pro tanto*, to let in the debt ; and that so much of the estate as remained unsold should be sold, and that the money raised or to be raised by sale of the estate made part of the personal estate of *Mr. Ogle*. There was another case about the same time, which is in 1 Ves. 174. *Cunningham v. Moody*, where, by marriage articles, £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint ; and in default of a joint appointment as the survivor should appoint ; and in default of any

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(a) As to this case, vide post, 513, n.

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appointment to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general, and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child which died, and she afterwards died without issue. A daughter of the settlor by a second marriage filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500, considering it as land; and it was observed that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the courtesy. In the present case, *William Fletcher* the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed with costs (a).

(a) Vide *Ackroyd v. Smithson*, next case but one, and the cases cited in the Editor's note.

20th November,
1779.

Where sums are specifically charged in the bill to have been received by the defendant, he must answer specifically to them; and it is not enough to refer to a schedule of all sums received.

HEPBURN v. DURAND.

ON exceptions to a Master's report disallowing exceptions to an answer, one exception was, that the defendant had not set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when received, and of whom, and on what account. The answer referred to a schedule, as containing an account of *all* sums received by the defendant. *Lord Chancellor* was of opinion, that the defendant was bound to answer specifically to the specific charges in the bill; and that it was not sufficient for the defendant to say generally, that he had in a schedule set forth an account of all sums received by him (a)

(a) See *Lord Eldon's* observations in *the case of White v. Williams*, 8 Ves. 195. *Mountford v. Taylor*, 6 Ves. 792, and

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S. C.

2 Dick. 564
Lincoln's-Inn
Hall, 4th June,
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CHRISTOPHER HOLDSWORTH, by his will, gave (*int. al.*) to the defendants *Smithson* and *Ibbetson*, their executors and administrators, £200, in trust to put the same out at interest, and to apply the interest in bringing up the defendant *Mary Bracklebank*, then an infant, till twenty-one, the principal to be paid to her at twenty-one, and if she died before twenty-one, then to be paid to her representative, and bequeathed to the Rev. *Thomas Whitaker* £100, to *James Roberts* and *William Roberts* £100 each, to *Grace Ogle* £200, to *George, Ann, and Phæbe Ogle*, her children, £100 each, to *Joseph Scurr* £200, to *Benjamin Wright* £200, to *Mrs. Molyneux* £400, to *Hannah Close* £150, to *William Hawkeswell* £100, to *Mary Ross* £200, to *Joseph Marshall* £200, all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator thereby gave all his messuages, cottages, lands, tenements, and hereditaments situate at the *Bank*, in the township of *Leeds*, with their appurtenances, and all his real estate not therein before devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants *Smithson* and *Ibbetson*, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns for ever, in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c. for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expences, and charges of proving his will; and after payment thereof, and retaining to themselves £50 each, which he thereby gave them for their trouble, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if after all such payments made, and putting out of the funds as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expences, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them, should, within six months after the same should be ascertained, pay the same unto his said legatees, *Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phæbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneux, H. Close, Wil-*
liam

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies. Two of the residuary legatees died living the testator.

These shares are lapsed, and so far as they are constituted by personal estates shall go to the person next of kin, and so far as they are constituted of real estate, to the heir at law.

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liam Hawkeswell, Mary Bracklebank, Mary Ross, and Joseph Marshall, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of £250 each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to M. Thackeray and R. Gaunt, during their respective lives, should, upon the several deaths of them the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneux died in the life-time of the testator.

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The bill was filed by the next of kin of the testator, against the surviving legatees and the heir at law; claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of £250 as lapsed, and become part of the personal estate of the testator,

The cause came on at the *Rolls*, 10th July, 1778, when his Honour (Sir *Thomas Sewell*) being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to *Lord Chancellor*; and the cause coming on to be heard before his Lordship—

Mr. *Kenyon* attempted to support the decree—

But *Lord Chancellor*, being clear (without hearing much argument) that this was a tenancy in common in the residue, and that therefore the shares of the legatees who died in the testator's life-time were undisposed of; said the only question was, whether such shares belong wholly to the next of kin, or to the heir at law.

The *Attorney-General*, Mr. *Madocks*, and Mr. *Selwyn*, (for the plaintiffs, the next of kin) contended—that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of *Mallabar v. Mallabar*, For. 79, and *Durour v. Mottaux*, 1 Ves. 320, must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard* (cited ante, 501.)—Mr. *Selwyn* mentioned the cases of *Flanagan v. Flanagan* (cited ante, p. 500.) *Fletcher v. Ashburner* (ante, p. 497,) and *Ogle v. Cook* (cited ante, 501.)

Lord

Lord Chancellor thought the two former cases did not apply; but being in general of opinion with the counsel for the next of kin, asked the counsel for the heir at law, upon what grounds they could support his claim.

Mr. Scott, for the heir at law, said, they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates, as the deceased residuary legatees would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened undisposed of, as is constituted by the produce of the testator's real estate. That the heir at law is entitled to every interest in land, not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir at law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take, he must make a disposition in favour of another: if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *a fortiori* in a case where he has expressed no intention, to the *hæres natus*. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted upon both hearings, that the benefit of lapsed devises would, according to the case of *Digby v. Legard*(a), and the principle of the case of *Emblyn v. Freeman*, Pre. Chan. 541, and of many others, have accrued to the heir at law. It is admitted and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir at law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made:—but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out, that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of *Durour v. Motteur* and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives. But we insist that if he has not actually and eventually so decided, they upon whom the law casts the title to personal estate, can no more claim in a court of equity, money arising from the sale of land, than the heir can claim property admitted to be

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of a personal nature. As to the question of fact, whether he meant that in some event only, or that in all events the produce of his real estates should be considered as personalty, we admit that in favour of his residuary legatees, he meant to convert the whole into personalty in case all his residuary legatees should eventually take the whole; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his legatees were to take; but as to such part of the property as in the event they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir at law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place, which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event the one or the other must take some part of it; but to say he has made it all personal property, and that therefore the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention: though the testator therefore intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature in case that particular event of his should be disappointed. In the event therefore which has happened, it is so much undisposed of, arising from the sale of lands. Such money in this Court is land; and as such the heir claims it.—Suppose all the fifteen legatees had died in the life-time of the testator, would it not have been competent to the heir at law to have insisted in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if in the event he had made no disposition; that because he had made the real estate personal to give it to his residuary legatees, and to disappoint his heir, he meant also to disappoint his heir whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his

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next of kin and his heir at law, but it proves a purpose hostile to both: can that fact then be a ground, from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and adverse to the interest of the heir only. The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property: but if, in the event, the law was to make the disposition of any part of the property, he meant, for aught that appears to the contrary, (and something must appear to the contrary to defeat the claim of the heir), that the law which made the disposition, should decide on the qualities of the property of which it was to dispose. If then, in case all the residuary legatees had died, the heir could have prevented a sale; it is to be said that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made to effectuate the testator's purposes, which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblin v. Freeman*, Pre. Ch. 541. the heir was held entitled to £200, arising from the sale of real estate, which the testator had made liable to an appointment by note, concerning which he made no appointment; and there a sale was necessary. In the case of *Digby v. Legard*, where the heir was held entitled to the benefit of the devise lapsed by the death of one of five tenants in common, of money to be raised by sale of real estates in the life-time of the testator, the heir could not possibly prevent a sale: as to the cases of *Mallabar v. Mallabar*, and *Durour v. Motteux*, they can be considered as authorities only by those who do not attend to the distinction submitted above: they are so far from deciding the case that they establish no principle which applies to it.—In *Mallabar v. Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust to sell: and that out of the monies arising therefrom, the testator's debts should be paid, and after payment thereof he devised out of the remainder of the money £500 to his sister *Mary Bainbridge*, £500 to his sister's two children that should be living at the time of his decease, equally to be divided between them, £500 to his nephew *Nicholas*, who was his heir at law, £500 to be divided amongst the children of his late brother's *James Mallabar*, living at his decease; then follows the clause which was held to blend the funds.—“*Item*, after all my “ debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister *Esther Mallabar*;”—and appoint her executrix. The question was, whether there was a resulting trust for the heir, as to the money arising from the sale of the

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the real estate, after payment of the debts and the several sums of £500. The Court held, that the testator had made all his property personal, or rather it inferred from the purpose of the testator, as far as that could be collected from the will, that the testator meant by the residuary clause to describe not only money strictly personal estate, but the money claimed by the heir likewise, the Court inferred this from the circumstance of the heir's having a legacy of £500 out of that very money, and because if a different construction was made, the sister his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office; for if the words, "the residue of the personal estate," did not include this money, the personal estate must have been first applied to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble without the benefit intended her: but though the Court considered the surplus of the money as personalty, as between her, [whom it held to be a residuary legatee,] and the heir, to effectuate the testator's intention, does it follow that if the testator had died intestate as to the surplus, as the testator here did as to a part of it, that the Court would have determined against the heir in favour of the next of kin, in whose favour no such argument as to intention could have been urged? If the residuary legatee had died in the testator's life-time, the will must have had the same construction as if the residuary clause had not been inserted; for where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will: if it had not been inserted, the devise of the real estate would have been a devise to pay debts and legacies merely; in such case then it is clear that as to the surplus, there would have been a resulting trust for the heir: the debts and the sums of £500 being paid, the testator's intention would have been satisfied to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case and the present case, except that in that case there is no residuary legatee, as to any part of the surplus; here there is none as to some part of it; there then is a *general intestacy* as to the surplus, here a *partial intestacy*: but the effect of a partial intestacy must be the same as to the part, as the effect of a general intestacy is to the whole. The case of *Durour v. Motteux* is also a case between residuary legatees and the heir at law; there the testator gave all his real estates to sell and dispose of the whole with his personal estate, blending them for payment of his debts, legacies, and funeral expences, and performance of his will; he gave several legacies, and among the rest £1,200, or thereabouts, whereof part was to be laid in the purchase of freehold lands for charitable uses, some of which were, confessedly, within the Mortmain act, and the rest determined to be so; the question was, whether the £1,200 should go to the heir at law or to the residuary legatees,

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legatees, Lord *Hardwicke* said that he was of opinion, that the money which should arise by the sale of the real estate, was turned into personal, and so intended by the testator, it plainly appearing that by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this—a will is made in which there are several legacies, and the residue of the personal estate is given away; one of the personal legacies is void by law; the Court cannot say for that reason, that he intended to die intestate, for giving the residue over includes every thing, let it fall in by reason of the legacies being void or lapsing in the life of the testator. Now here the reasoning of the Court is grounded upon the testator's intention to give his residuary legatees every thing which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees could not otherwise take the £1,200. But if the residuary legatees had died in the life-time of the testator, and the next of kin had been called upon to sustain the question against the heir, the reasoning of the Court would not apply: arguments from intention in their favour could not be resorted to, and the Court might have said and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not in that case have been said, that the testator meant, by the description of all his personal estate, to include the whole in the residue, and therefore the void legacy of £1,200 among the rest; because the will in that case must be considered as if nothing concerning the residue had been inserted in it. Here he meant to make one fund of the whole to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour v. Motteux*, it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies and funeral expences; it would have been then a disposition with a special intention; that intention being satisfied, there would have been a resulting trust as to the surplus. It is said if this way of reasoning was good, it would have entitled the heir to the £1,200 in the case of *Durour v. Motteux*, for it was the testator's intention there, that the same sum should be considered as money only in case the charity took it; that the testator never adverted to the event which happened, viz. the residuary legatees taking it, an event which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer in that case, what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed

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sumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law. So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself, he would say, if my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place: but where the residuary legatee is removed, there is nothing like a declaration by the testator in favour of the next of kin, to entitle them to succeed the residuary legatees, as there is where there is a general residuary clause in a will in favour of the persons named in it to succeed the particular legatees; and to money arising by the sale of land, there can be no claim in the next of his kin, but what arises from the declaration of the testator; for unless he directs or expresses that it shall be considered as personalty, the heir must take it. We admit the heir then to be excluded whilst there are any persons who can take the produce of the real estate under the will, the declaration of the testator's intention: we deny that he is excluded by any who make their claim not under the will but in defect of the will; or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse v. Barley and Banson*, before Sir Joseph Jekyll, 3 P. W. 20. seems to establish those principles; for it shews that where any part of the produce of the real estate is so given as to prove that it was not the testator's intention, in case part should lapse, that it should go to the residuary legatees, but that he has given them the residue exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take in preference to the heir, what the residuary legatees cannot take for another reason, namely, removal by death? The case was, *William Banson* seised in fee of freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant *Barley* and his heirs, in trust to sell for the best price, and in the first place to pay off all his incumbrances and his debts. He also devised his personal estate to the same trustee in trust to sell, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner thereafter mentioned: to his eldest son £200 at his age of twenty-one; all the rest and residue thereof among his four younger children at twenty-one, and with benefit of survivorship; the eldest son died under twenty-one: the question was, what was to become of the £200. The *Master of the Rolls* thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate,

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is to go to the *heredes facti*. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed *residuum*: but his Honour, after looking into precedents, declared for the heir, that it was the same as if so much land as was of the value of £200 had not been to be sold, but suffered to descend. As to the case of *Flanagan v. Flanagan*, it is perfectly different from this: that was a question between the real and personal representative of a person entitled under the will of the testator. The land was sold under a decree of the Court, in a cause in which the person, through whom both claimed, was party; and the decree had ordered the surplus, if there should be any, to be paid to *James Flanagan* the father and *James Flanagan* the son equally. The sale was made under the decree; and the question arising between the real and personal representative of *Flanagan* the father, the Court determined the surplus should have the same nature with respect to them, as the decree had given it with respect to *Flanagan* the father. In that case too the testator had, foreseeing that a sale could not be made which would produce the exact sum and no more, directed his trustees to convey the residue of the real estate which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates between the father and the son. *Scudamore v. Scudamore*, Pre. Ch. 513, is not to this point: it determines that the representatives of a person entitled under a will, shall take money, as money or as land, according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as entitled against the heir, in the event of a lapse of the whole or a part of the residue, except the case of *Ogle v. Cooke* (a), heard 19th February, 1748, which, so far as it relates to this subject, was thus: Mr. *Ogle* made his will in 1744, and gave his real estate to trustees to sell and vest the money in stock, and pay the interest to his wife during her widowhood, and after her death or marriage, the principal to his two daughters equally, except that the eldest was to have £1,000 more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance in trust to sell for payment of his debts, which was held a revocation *pro tanto* only, and part was sold. One of the daughters died in Mr. *Ogle*'s life. The bill was brought by the widow and the eldest daughter, against the son the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter as personal estate of

(a) In *Collins v. Wakeman*, 2 Ves. jun. 686, Lord Rosslyn directed the Register's book to be examined for the case of *Ogle v. Cooke*, and in the report of that case the facts of it are very

particularly stated. It appears from thence, that the only point which applies to this string of cases was left undecided.

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Mr. *Ogle*, to be divided between them and the son. The son insisted that her share was to be considered as real estate: the Court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. *Ogle*'s personal estate. Here it cannot be denied, that the intention of the testator to convert this estate into money, for the sake of his daughters, was taken to be a sufficient ground for the Court's considering the moiety, which in the event was undisposed, as personal estate: but the case of *Digby v. Legard* is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of the persons interested in the produce. The daughters, in the case of *Ogle v. Cooke*, indeed had an interest in the personal as well as real estate, which was not given in that of *Digby v. Legard*; but the funds are kept separate, and not blended in *Ogle v. Cooke*. The determination in the latter case, we submit, is neither justified by principle or by authority. The case of *Ogle v. Cooke*, admits the deceased daughter's moiety, in both the real and personal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to a disposition, is to take effect though the disposition does not take effect. Upon the whole, we contend, that if the shares of the deceased legatees in the overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin, do not apply (a).

The *Chancellor* reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus, should be divided between the next of kin and the heir; this is, so much of those shares as was constituted of the personal estate to the next of kin, and so much as was made up of the produce of the real estate to the heir. He said, that he fully approved the determination in *Digby v. Legard*. That he used to think, when it was necessary for any purposes of the

(a) The principal subsequent cases in which the doctrine contended for, and subsequently established by this celebrated argument, has been relied upon and followed, are *Robinson v. Taylor*, post, vol. ii. 389. *Hutchinson v. Hammond*, post, vol. iii. 128. *Chitty v. Parker*, post, vol. iv. 411, S. C. 2 Ves. jun. 271. *Collins v. Wakeman*, ib. 683. *Kennell v. Abbott* 4 Ves. 802. *Williams v. Coade*, 10 Ves. 500. *Berry v. Usher*, 11 Ves. 205. *Wilson v. Major*, ib. *Gibbs v. Qugier*, 12 Ves. 418. *Wright v.*

Wright, 16 Ves. 188. *Hill v. Cocke*, 1 Ves. & Bea. 173. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294. *Kellett v. Kellett*, 1 Ba. & Be. 533. Affirmed in Dom. Proc. 3 Dow. P. C. 248. *Hooper v. Goodwin*, 18 Ves. 156. *Ashby v. Palmer*, 1 Meriv. 296. As to the doctrine respecting the conversion of property by the effect of contract, vide *Ripley v. Waterworth*, 7 Ves. 425. and several cases referred to in the very luminous judgment of Lord Eldon.

testator's

testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale; and yet to say that because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said, he approved the distinctions made in behalf of the heir, and decreed as before.

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CADLE v. FOWLE.

THE plaintiffs filed their bill, stating a mortgage by the defendant's father, to the testator of the plaintiff Cadle, and another, and praying a sale. The defendant answered, admitting the mortgage; and then applied to the Court, upon the act of 7 Geo. 2. c. 20. for the usual decree upon a bill of foreclosure. The plaintiffs now applied to discharge that decree, and for liberty to amend their bill, by stating a bond, which they insisted they were entitled to tack to the mortgage. The *Master of the Rolls* was of opinion, that the order already made, being a decree, though made upon motion, could not be discharged upon motion. The words of the act are, "the Court shall make *such order, or decree, as the Court might have made if the suit had been brought to a hearing, and all parties shall be bound by such order or decree, to all intents and purposes, as if such order, or decree, had been made at, or subsequent to the hearing of such suit (a).*"

Rolls,
26th May, 1780.
A decree, though made on motion, (under 7 Geo. 2. c. 20.) cannot be discharged on motion.

(a) Vide ante, 489.

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Trin. Term,
1780.
Before Eyre, for
Lord Chancellor.

WYNNE v. COOKES.

THOMAS WELCHMAN WYNNE, and MARY his
Wife, Widow and Devisee of DAVID COOKES, } Plaintiffs.
deceased, - - - - - }

THOMAS COOKES and GEORGE COOKES, - Defendants.

Enfranchisement
of a copyhold
estate, by a per-
son having only
a particular in-
terest, is for the
benefit not only
of himself, but of
all the persons in
remainder.—Re-
covery suffered
by one not in pos-
session, has no
operation.

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SIR Thomas Cookes, seised in fee of a considerable freehold, and of a copyhold held of the manor of *Tarbig*, called *Cab-house*, by will dated 19th February, 1696, devised the estates and part of the copyhold in *Tarbig*, to his nephew *Thomas Winford* for life, with remainder to his first and other sons in tail male; with remainder to *John Winford* for life; with remainder to his first and other sons in tail male; with remainder to *Henry Winford* for life; with remainder to his first and other sons in tail male; with remainder to *John Cookes*, and his heirs male for ever. Sir *Thomas Cookes* died in 1701, and upon his death *Thomas Winford*, afterwards Sir *Thomas Cookes Winford*, entered, procured the *Tarbig* estate to be enfranchised, and a conveyance thereof to be made to him and his heirs. He died in 1743, without issue, and by his will gave the *Tarbig* estate to his wife dame *Elizabeth* in fee, considering himself as absolute owner of that estate; and she entered and continued in possession till 1752. *John* and *Henry Winford* died without issue, in the life-time of their brother Sir *Thomas Cookes Winford*, and *John Cookes*, the last remainder-man in the will of Sir *Thomas Cookes*, also died before Sir *Thomas Cookes Winford*, leaving two sons, *John* and *Henry Cookes*. *John Cookes*, upon the death of Sir *Thomas Cookes Winford*, entered upon all the estates devised by the will of Sir *Thomas Cookes*, except the *Tarbig* estate, and by indenture dated the 15th of April, 1744, conveyed all the manors, &c. devised by the will of Sir *Thomas Cookes*, in general, to *Thomas Wyld* and his heirs, to make him tenant of the freehold for the purpose of suffering a recovery, and a recovery was suffered accordingly. At the time of the execution of the indenture of bargain and sale, and of suffering the recovery, dame *Elizabeth Cookes Winford* was in the actual possession of the enfranchised estate at *Tarbig*, and claimed the same as her own estate, and *John Cookes* was never in possession, nor ever made any entry, or did any act to avoid the estate of dame *Elizabeth*. By the custom of the manor of *Tarbig*, copyholds may be intailed, and intails may be barred by recovery suffered, or surrender made in the Court of the manor, according to custom. *John Cookes* died in ——— without issue, by his will he devised all his estates to *William* and *John Russell*, in trust, to pay his debts, and subject thereto to his own first and other sons in tail male, with remainder

to his daughters in tail general, with remainder to his nephew *Henry Cookes*, son of his brother *Henry*, for life, with remainder to his first and other sons in tail male, with remainder to his nephew *David Cookes*, the second son of his brother *Henry*, for life; with remainder to his first and other sons in tail male, with remainder to *Thomas Cookes*, the third son of *Henry*, and his first and other sons in like manner, with remainders over. *Henry*, brother of *John* the last testator, died in his life-time, leaving *Henry*, *David* and *Thomas*, his three sons, successive devisees for life, in the will of *John*. *Henry* the eldest, upon the death of *John*, entered upon all the estates of *Sir Thomas Cookes*, except the *Tarbig*, and in 1749, filed a bill against the widow of *Sir Thomas*, dame *Elizabeth Cookes Winford*, and *Hillier*, her then husband, stating the will of *Sir Thomas Cookes*, the enfranchisement of the estate, the several subsequent events, and claiming the *Tarbig* estate, by virtue of the limitations in the will of *Sir Thomas Cookes*.

The cause was heard the 3d of *May*, 1749, when the Court declared, that it appeared that *Sir Thomas Cookes Winford* took the copyhold estate in question, and enjoyed the same under the will of *Sir Thomas Cookes*, and that the enfranchisement taken of the premises, was for the benefit not only of himself, but of all persons entitled thereto in remainder under the will of *Sir Thomas Cookes*, and it was therefore decreed that, on payment, by the plaintiff, in six months, of £750, the consideration for the enfranchisement, the premises should be conveyed to the use of the plaintiff, and the other uses in the will of *Sir Thomas Cookes*, then existing and capable of taking effect. Before any conveyance in pursuance of this decree, *Henry Cookes* died without issue, without having done any act affecting the *Tarbig* estate. His brother *David* therefore, upon his death, as heir male of the body of the first named *John Cookes*, claimed to be entitled to the estate as tenant in tail male, and, by indentures of lease and release, dated the 8th and 9th of *June*, 1752, and made between dame *Elizabeth Cookes Winford*, then a widow, by the name of *Elizabeth Hillier*, of the first part; *Henry Roberts* and *Joseph Kingdon*, of the second part; *David Cookes*, of the third part; and *Thomas Banks*, of the fourth part; *Elizabeth Hillier*, in consideration of £709, and in pursuance of the above-mentioned decree, conveyed the *Tarbig* estate to *David Cookes* and his heirs, to the use of *David* and the heirs male of his body, and after reciting that a term of 1000 years created by *Sir Thomas Cookes*, (who had ineffectually attempted to enfranchise the estate) was then vested in *Roberts* and *Kingdon*, they conveyed the estate, for the residue of that term, to *Banks*, in trust for *David Cookes*, and further reciting, that the above sum of £709 was paid by *Banks*, and that *David Cookes* had occasion for £591 more, *David Cookes* declared that the term should be a security for, and subject to redemption on payment of £1,300,

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£1,300, and interest, to *Banks*. By indentures of lease and release, the 14th of *June*, 1752, *David Cookes* conveyed the estate to make a tenant to the *precipe* for suffering a recovery, and a recovery was suffered accordingly. In 1755, *David* made his will, and devised the estate to *Stephen Law*, in trust, for the plaintiff *Mary* for life, and after her death, in trust, for his daughters. *David* died in without issue, leaving *Thomas Cookes* his brother and heir, who paid off *Banks*, and took an assignment of the mortgage. The bill was brought by the plaintiff claiming under the will of *David Cookes*, praying liberty to redeem the mortgage, and an account of the rents, profits, and recovery of the estates, to the uses in the will of *David*.

Baron *Eyre* was of opinion, that by the words "heir male," the first named *John Cookes*, took an estate in tail male, under the will of Sir *Thomas Cookes*, that *John Cookes* his son, not having been in possession of the estate in question when the recovery was suffered, it had no operation on that estate, that *David* was therefore seised in tail male, that the recovery suffered by him barred the entail, and the estate was therefore well devised by his will, and decreed accordingly (a).

(a) This case was cited in the argument in *Lord Grenville v. Blyth*, 16 Ves. 224, in which, and the cases cited in the note to *Boteler v. Allington*, ante, 72, the doctrine upon the subject of equitable recoveries is to be found. As to the necessity for the person

against whom the writ is brought to be in possession of the freehold at the time when judgment is given, vide *Taylor*, dem. *Atkyns v. Horde*, 1 Burr. 60. *Goodtitle*, dem. *Brydges v. Duke of Chandos*, 2 Burr. 1065. 5 Cruise Dig. 287, et seq.

Tri. Term,
1780.

Baron *Eyre*, for
Lord Chancellor.

J. H. FRASER, SON of SIMON FRASER, and } Plaintiff.
MARY his Wife, - - - - - }

JAMES BAILLIE, and EVAN BAILLIE, the said }
SIMON FRASER, and MARY his Wife, and their } Defendants.
Children (except the Plaintiff), - - - - - }

Where trustees are interposed, the Court will not authorize a woman's parting with her life interest in a sum of money, upon examination in analogy to that upon a private examination.

SIMON FRASER, the elder, entitled to two sums of money due to him on bond, assigned the same to *James and Evan Baillie*, in trust, to pay him the interest during his life, and upon his death, to pay the interest of part to his wife for her life, and after the death of the survivor, to pay and apply that part unto and amongst such child or children begotten, or to be begotten, of them the said *Simon Fraser* and *Mary* his wife, in such shares and proportions, and at such times, as she the said *Mary Fraser* should, notwithstanding her coverture, by any writing under her hand and seal, to be attested by two credible witnesses, direct or appoint; and, for want of such direction or appointment, then in trust, to pay

pay and apply the trust-money, and the interest thereof, to all and every the child or children of them the said *Simon Fraser* and *Mary* his wife then living, to be paid entirely to one such child, in case there should be no more than one, and to be equally divided among them, share and share alike, in case there should be more such children than one; but in case there should be no such child or children living, then in trust for the executors, administrators, and assigns of the said *Simon Fraser*. *Mary Fraser* made an immediate appointment of £500, part of this money, in favour of the plaintiff, one of the sons of her and her husband, and, by the same deed, she and her husband meant to part with the interest of £500, during their lives. The bill was brought to compel the trustees to pay the £500 to plaintiff, and, for that purpose, prayed that *Mrs. Fraser* might be examined by the Court, as to her consent to part with her interest for life in the £500, in the nature of a fine at common law of real property, and that a commission might issue to take her examination. An objection was raised to the validity of the appointment, as a partial execution of the power, not an entire disposition of the whole trust fund. It was particularly observed that the trust deed did not enable *Mrs. Fraser*, from time to time, to appoint, which are the words commonly used, and that it declared no trust of any part which should remain unappointed, in case any appointment should be made.

Baron *Eyre* objected, that it did not occur to him that, in any case where trustees had been interposed, the Court had authorized the departure with the property of the wife, by examining her in the nature of a fine at law (a).

(a) There are some old cases which were cited and received by Sir *W. Grant*, (10 Ves. 580.) in which this jurisdiction was adopted, and the consent of the wife taken in Court. It was also done in *M'Cormick v. Butler*, 1 Cox, 357, and *Guise v. Small*, 1 Anst. 277. In the cases however of *Richards v. Chambers*, and *Seaman v. Dmill*, 10 Ves. 580, Sir *W. Grant* examined

the jurisdiction contended for, and came to the conclusion, that it did not exist: that a court of equity cannot, by the consent of a married woman, upon examination, transfer to her husband personal property settled in trust for her, surviving her husband, absolutely. Vide also *Sperling v. Rockford*, 8 Ves. 164.

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Baron Eyre, for
Lord Chancellor.
Tria. Term,
1780.

Testator gives to
his heir at law
for life, remain-
der to R. C. for
life, and to his
first and other
sons, remainder
to R. S. and
W. M. for their
joint lives, and
to the survivor
of them, the
survivor is only
to take an estate
for life.

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AWSE v. MELHUIH.

ROBERT AWSE, the plaintiff's husband, by his will, gave to the plaintiff £50 a year, and the use of his house at *Horwood*, with the household goods, plate, &c. for and during her life, over and above her jointure, in case he should die without issue male; and he gave to his sister *Mary Melhuish*, £200, and several other legacies, and all his estates and effects, manors, messuages, lands, tenements, and hereditaments, which he should have in possession or reversion, whether freehold or leasehold, he gave, devised, and bequeathed to *Richard Stevens*, his father-in-law, *William Melhuish*, his brother-in-law, and *Richard Clarke*, his cousin, in trust, in the first place for payment of the plaintiff's jointure, and the legacies given by his will; and as to all his manors, messuages, lands, tenements, and hereditaments, thereinbefore devised to his said trustees, subject to his legacies, and the plaintiff's jointure, he willed, directed, and devised the same to be in trust for his sister *Mary Melhuish* for her life, and after her decease, in trust, to his cousin *Richard Clarke* for his life, and after his decease, in trust, for his first and other sons in tail male, *Richard Clarke*, or his son so inheriting taking the name of *Awse* instead of *Clarke*; and as to the rest and remainder of his goods, chattels, and hereditaments not therein devised, he directed the same should be laid out in lands, and settled to the uses above directed with respect to his freehold estates; and that till lands could be found, the interest should be paid to the persons enjoying his freehold estates; and in case the said *Richard Clarke* should die without issue, he gave, devised, and bequeathed all his estates and effects, manors, messuages, lands, tenements and hereditaments whatsoever, in possession or reversion, to the said *Richard Stevens* and *William Melhuish* during their joint lives, and to the survivor of them; he appointed *Richard Stevens*, *William Melhuish*, and *Richard Clarke*, executors of his will, and gave to each of them for their trouble £100. *Robert Awse* died in 1764, without having had any issue, leaving the plaintiff his widow, and *Mary Melhuish*, his sister and heir at law. *William Melhuish* died, leaving *Richard Stevens* surviving; *Richard Clarke* also died, without having had any issue. Afterwards *Richard Stevens* died, leaving the plaintiff his heir at law, and having made his will, and devised his real and personal estate to the plaintiff, and made her sole executrix. The plaintiff brought her bill against *Mary Melhuish* the sister and heir at law of the testator, and against the heir at law of *William Melhuish*, and the widow and personal representative of *Richard Clarke*, claiming as heir at law and residuary devisee and legatee, and executrix of her father *Richard Stevens*, to be entitled to the freehold

freehold estates of the testator after the death of *Mary Melhuish*, and the personal estate to be laid out in the purchase of land upon the same event; and therefore praying that the will might be established and the trusts performed, and particularly praying an account of the personal estate, and of estates purchased therewith by Mr. and Mrs. *Melhuish*.

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On behalf of the plaintiff it was contended, by Mr. *Mansfield*, Mr. *Waller*, and Mr. *Scott*,—that by the devise of the will to *Stevens* and *Melhuish* and the survivor, the whole interest in the freehold and leasehold estates, and in the estates to be purchased with the rest of the personal estate, passed to *Stevens* as surviving *Melhuish*, subject to the previous estates created by the will; that the words used were sufficient to carry the fee in the freehold as well as the absolute interest in the leasehold to the survivor, and that the lands to be purchased with the personal estate were to be settled to the same uses throughout as were to be limited of the freehold estate, that the testator meant by the will to dispose of all his property: he gave a life estate in the whole to his heir at law, and where he meant to give estates for life only to others, did so by express words; that the devise to the survivor of *Stevens* and *Melhuish* being unaccompanied by words of limitation, it was evident the testator meant to give them the whole interest, that the words in which he had given the estates to *Stevens* and *Melhuish* were the same as those in which he had devised the estates to the trustees, to whom he clearly meant to give the absolute interest, to answer the purposes of the trust; that the words used in the devise in question were sufficient to convey all the interest the testator had in the property, as well as the property itself: for this purpose was cited a case of *Jackson v. Hogan*, in the House of Lords in 1776, (7 Bro. P. C. 417.) where a devise of the residue of the testator's effects both real and personal was held to carry the absolute property. It was further contended that, if a small transposition of the words was made, they would be clearly sufficient to carry the fee-simple, that if the devise had been to *Stevens* and *Melhuish* for their lives, and then had followed the words, "I give, devise, and bequeath all my estates and effects, manors, &c. whether in possession or reversion, to the survivor," there could have been no doubt that the absolute interest in the entire property would have passed to the survivor; that the devise as it stood was in fact the same. A second point was made on the part of the plaintiff, that if the estate in trust in the personal estate to be laid out in lands, did not pass to the survivor of *Stevens* and *Melhuish*, then it was undisposed of, and a moiety belonged to the plaintiff as widow of the testator.

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On behalf of the defendant Mrs. *Melhuish*, it was contended by Mr. *Madocks* and Mr. *Kenyon*, that as there were no words added

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added to the devise to the survivor of *Stevens* and *Melhuish*, the survivor took, in the freehold estates, an estate for life only, and that therefore was undisposed of and descended to Mrs. *Melhuish* as heir at law; that the heir at law was not to be disinherited but by express words, such as leave no doubt of the intention of the testator: that the words used in the devise in question were mere words of description, and that as the estates were given first to the devisees for their joint lives, it was absolutely necessary to add the devise to the survivor to give him an estate for life.

On the part of Mrs. *Clarke*, it was submitted to the Court whether she might not have an interest in the leasehold estates, as personal representative of her husband: yet it might be contended the words, "and if the said *Richard Clarke* shall die without issue," which preceded the devise to *Stevens* and *Melhuish*, gave him by implication an estate in tail general in the freehold estate, and consequently the absolute interest in the leasehold estate.

In answer to this claim, it was insisted that by the words "without issue," must be intended without such issue as before mentioned, namely, issue male, and then no estate could arise to Mr. *Clarke* by implication. In support of this were mentioned *Blackborn v. Edgley*, 1 P. W. 600. *Bamfield v. Popham*, ib. 54. and *Jones v. Morgan*, *Fearne's C. R.* 334 (a).

Baron *Eyre*.—Two questions have been made in this cause. It has been insisted on behalf of the plaintiff, that she is entitled to the reversion in fee of the freehold estate, and to the absolute interest in the leasehold, they being devised to the survivor of *Stevens* and *Melhuish* without any words of limitation; and that she is entitled in like manner to the fee of the estates to be purchased with the personal estate, and therefore she prays an account of the personal estate: the devise is to *Stevens* and *Melhuish* and to the survivor, there is no doubt of the general rule of law as to the effect of such limitation, but the intent of the testator may control or enlarge the strict legal construction of words. The question will not be affected by the consideration, that the heir at law will be excluded if the plaintiff prevails. It is clear the testator intended to exclude the heir at law to a certain extent, and where a testator has manifested an intention of devising an estate to a certain length, there is an end of the claim of the heir at law, except upon the construction of the devise. The strict rules of construction must prevail, the legal effect of words must take place, unless there is a manifest intention to the contrary. By the clear legal construction of the words in question, if the devise was a mere gift of lands, the devisee would take only for life. The

(a) Aute, 206.

question is, whether upon this will there is an apparent intent to enlarge the estate and make it an estate in fee. It has been contended for the plaintiff, that there is such an intent declared; that an estate for life in the whole is given to the heirs, and from thence it is contended that the testator intended to exclude the heir from further benefit. It is a great deal too much to conclude, from the devise to the heir for life, that so much was intended. The principal objects of the testator's bounty appear to have been his cousin *Richard Clarke* and his issue; there is a limitation in tail to the issue, and they are directed to take the name of *Awse*, there is no such limitation or direction to the children of the heir at law, or to the survivor of *Stevens* and *Melhuish*. *Clarke* and his issue were the persons whom the testator considered as perpetuating his name and family; if they failed he had no particular object of his bounty. But why should the devise to the heir exclude the strict legal construction of the words used in the devise to the survivor of *Stevens* and *Melhuish*? The heir at law takes not by designation of the testator, but because the property is undisposed of; the law did not necessarily carry it to Mrs. *Melhuish*; if she had died before the testator it would have gone to others. It has been attempted to make use of the general words in the devise, to the trustees without any limitation of estates, and from thence to argue that a fee must also have been intended to pass by the second devise in the same words: but in the second devise, with those general words, there is an express limitation to *Stevens* and *Melhuish* for their joint lives, which goes a great way to shew that the intent was to give a life estate only to the survivor; besides the Court does not raise a fee to the trustees, by the naked words of the devise, but the testator having given estates upon trusts, for the performance of which a fee is necessary, the Court must necessarily hold the devise to the trustees to be a fee (a); in the subsequent devise the Court must look for other words to enlarge the devise. An argument has been drawn from the generality of the words used, "all his estate and effects, &c." and it has been insisted that the words are so general, so descriptive not only of the lands themselves, but of the interest in them, that they must mean the whole interest in the lands as well as the lands themselves. It is impossible to build so much on these words, because a life estate is expressly limited upon these words; it is clear that the testator meant there no more than a description of the subject of the devise, not of the interest devised (b). Upon what principle then can I determine that the survivor took a different interest from the joint tenant? I see no reason why the testator should mean or wish to give more than a life estate to the survivor: this is indeed mere conjecture; but I am desired, upon

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(a) See the cases cited in the note to *Shapland v. Smith*, ante, 75.

(b) As to the effect of these and

similar expressions, vide the cases cited in the note to *Huxtop v. Brooman*, ante, 437.

conjecture,

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conjecture, to enlarge the legal construction of words; I will not narrow it. There is no manifest intent of the testator's to enlarge the words beyond their strict legal meaning, or to confine them. The law must therefore determine the question. By the strict legal construction of the words the survivor takes a life estate only in the freehold. I must therefore determine that the plaintiff is entitled to the leasehold, subject to the life interest of Mrs. *Melhuish*; but that she is not entitled to the freehold, and consequently is not entitled to the lands to be purchased with the personal estate; I must therefore dismiss the bill as to that.

## DAVIES v. TOPP.

SARAH DAVIES and another, in behalf of themselves and other Creditors of JOHN TOPP, deceased, and MARTHA LLOYD, in behalf of herself and other Legatees of JOHN TOPP - } Plaintiffs.

RICHARD TOPP (late LLOYD) Executor of the Will of JOHN TOPP, and Devisee for Life of his real Estates, SARAH LLOYD and JANE PRICE, Sisters and Co-heirs of JOHN TOPP and ROBERT PEMBERTON, a Mortgagee - } Defendants.

July, 1780.

Testator devised certain estates, subject to a general charge for payment of debts; he afterwards purchased another estate which descended: this shall exonerate the devised estate if the personal be insufficient to pay the debts.

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**J**OHAN TOPP, seised in fee of considerable real estates, subject to a mortgage to *Pemberton*, made his will 3d of May, 1777, and thereby as to his worldly estate, either real or personal, after payment of his debts and funeral expences, gave and disposed thereof in manner following: He gave to his sister *Sarah Lloyd*, an annuity for her life, to be paid to her by the person or persons who for the time being should be seised of his real estates under his will, and he also gave several pecuniary legacies, and he charged and made chargeable all his real and personal estate (except part of his personalty given as heir-looms) with the payment of his debts and legacies aforesaid, and subject thereto, he devised all his manors of *Whitton* and *Vennington*, and all his real estates in the counties of *Salop* and *Montgomery* (which were all the real estates he had at the time of making his will) to his nephew *Richard Lloyd* for life, on his obtaining the king's licence to bear the arms and assume the surname of *Topp*; remainder to trustees to preserve contingent remainders: remainder to the first and other sons of *Richard Lloyd* in tail-male: remainders over in strict settlement: and he gave several articles of personal estate to be enjoyed as heir-looms by the devisees of his real estate: and as to all the rest of his personal estate, subject to the payment of his debts, legacies, and

and funeral expences, he gave the same to his said nephew *Richard Lloyd*, and appointed him executor of his will. APPENDIX.

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After making the will the testator purchased a freehold estate at *Vennington*.

In *April* 1778, he died without issue, leaving *Sarah Lloyd* and *Jane Price*, his sisters and heirs at law, upon whom the estate at *Vennington* (purchased after the making of the will) descends.

The bill was brought for an account and application of the personal estate, not specially bequeathed, in payment of debts and legacies, in a course of administration; and in case the personal estate should not be sufficient, then to establish the will, and to have the deficiency raised by sale or mortgage of a competent part of the real estate.

The cause was heard at the *Rolls* on the 15th and 25th *February*, 1780, when the will was established and the proper accounts directed, and the personal estate, not specifically bequeathed, was ordered to be applied in payment of the debts, legacies, and funeral expences, in a course of administration; but in case such personal estate should not be sufficient for the payment of testator's debts, his Honour declared that the deficiency, as to what should be remaining due to defendant *Robert Pemberton*, the mortgagee, and the other specialty creditors, ought to be raised by sale or mortgage of the real estate descended to the heirs at law: and ordered and decreed that such deficiency should be raised by sale or mortgage of the said estate, or a sufficient part thereof, and the money to arise by such sale or mortgage was to be applied in making good such deficiency; and in case the personal estate and money to arise by the sale of the real estate descended should not be sufficient for the purpose aforesaid, it was declared that the rents and profits of the said estate were to be applied to make good such deficiency, and an account and application of such rents and profits was directed; and in case the defendant *Pemberton*, the mortgagee, or any of the specialty creditors should have exhausted any part of the personal estate, the simple contract creditors in the first place, and the legatees in the next place, were to stand in the place of such specialty creditors, and receive a satisfaction *pro tanto*, out of the real estate descended. But in case the fund aforesaid should not be sufficient for payment of the debts and legacies, under and according to the direction aforesaid, it was declared that the deficiency ought to be made good out of the real estates devised by the will, charged with the payment of the testator's debts and legacies, and proper directions were given for that purpose.

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The costs were apportioned between the personal estate and the real estates, and the costs out of the real estates were to be raised in the order and manner before directed with respect to the deficiency of the debts.

The heirs at law appealed to the *Lord Chancellor* against so much of the decree as applied the real estate descended, in the first place, to make good the deficiency of the personal estate, to pay the mortgagee and specialty creditors, and the consequent direction, and the direction as to the costs.

The appeal was heard before *Lord Thurlow* in *July*, 1780.

The case relied upon by the devisee of the real estate which passed by the will, and which had been relied upon by the Master of the *Rolls*, was *Galton v. Hancock*, 2 Atk. 424. 427. 430.

On the other side, the principal case cited was *Corbet v. Davies*, or *Corbet v. Kynaston*, 5th December, 1743, or *Powis v. Corbet*, 3 Atk. 556.

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*Lord Chancellor*.—It is impossible to distinguish this case from *Galton v. Hancock*. The first fund for the payment of debts is the personal estate; the second fund may be estates devised for payment of debts; and the third fund estates descended: but estates particularly devised are never applied till all the other funds are exhausted. Where a person, seised of three or four estates, devises one estate for the particular purpose of paying his debts, that estate is applied: I therefore do not apprehend that the general rule, cited as sustaining *Galton v. Hancock*, "that estates descended must always be applied to exonerate estates devised," is law. Where an estate is particularly devised for payment of debts, yet the personal estate, as the primary fund, unless exempted by the testator, shall be first applied. But I do not recollect any case where debts have been directed to be paid out of real assets descended in preference to estates so devised. The contrary has been decided, as in *Corbet v. Kynaston*, where two estates were in the possession of the testator, and one was devised, charged with a term for the payment of debts. I heard the defendants, the devisees, principally to obtain a distinction between *Corbet v. Kynaston* and *Galton v. Hancock*. What is the effect of the full principle of this decree and of *Galton v. Hancock*? Simply this: where a testator gives the whole of his estate at the time of the devise, subject to a general charge (not to a particular charge, for that would make a difference), he means to give the devisee all that can be saved of his affairs, after payment of his debts. If he afterwards becomes possessed of an estate by devise or purchase, thus much is clear: by charging his estate with pay-  
ment

ment of his debts, it could not be in his contemplation to charge an estate which he actually gave in favour of an estate which he had not. In that case the estate descended could not be stated as the object of his intention to exempt; whereas if a testator has two estates and charges one, the inference is that he means to exempt the other. I do not wonder that *Galton v. Hancock* should be at first looked upon as matter of great difficulty. The principle of *Galton v. Hancock*, as stated, is, that the testator did not mean to charge his estate with a view to future property. Yet he might so mean. It is unfit however, where cases are precisely similar, that different judgments should be given: therefore whatever might have been the reasoning upon *Galton v. Hancock*, when decided, it is exceedingly fit to collect the principle upon which it was decided, to govern other cases. The principle which seems to distinguish the case is this: when a general charge is made, applicable to the whole estate of the testator at the time, no intention appears that the estate is so charged with a view to exonerate future property; but where a testator charges part of his estate, leaving other part to descend, his inclination to burthen a part, in exoneration of the rest, is manifest (a).

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(a) Vide *Donne v. Lewis*, post, vol. ii. 257, and the Editor's note to it.

(b) JONES v. The Earl of SUFFOLK.

20th July, 1780.

**G**EORGE JONES, of Woolwich in Kent, by his will, having given his household goods, &c. to his wife, gave and bequeathed all his other estates to his said wife *Mary Jones*, for and during so long of her life as she should continue his widow, in trust, to pay his debts, and educate his children till each should be married; and after the decease or marriage of his said wife, then he directed all his real, leasehold, and personal estate should go to, be paid, and applied to the equal use of all and every such his child or children as should be then living; and in case his wife should marry again, she should from that time have no further to do with any his child or children, or any of his effects, &c. but the child or children should be under the care of guardians, to be chosen and appointed as soon as possible upon that occasion, and trustees should be appointed for his effects for the benefit of his children till they attain the age of twenty-one; and in case any of his children should die before they should attain the age of twenty-one, then his or her share should go and equally be divided

Testator devises the residue to his children, but if any of his daughters shall marry without the consent of her mother or guardians, her share to go to those unmarried. This is a condition subsequent, and a daughter who married without consent is entitled.

(b) Vide *Scott v. Tyler*, post, vol. ii. 431.—*Stackpole v. Beaumont*, 3 Ves. 39.—*Burton v. Humphrey*, Ambl. 256.

among

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among the surviving ones; and in case any of *his daughters should marry without the consent of her mother, and in default of her mother, her guardians, first had and obtained, then her share to be equally divided among the unmarried ones*; and in case they should all die before their respective ages of twenty-one, then his estates, &c. to be subject to the will of his wife, provided she be unmarried at the time of his decease; and appointed his wife and *William Stevens* (her father) joint executors of his will, and guardians of his children.

*Mary*, one of the daughters, married without consent; and the question was, whether she had forfeited her interest under the will.

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*Lord Chancellor*.—This is a case of difficulty.—It is a condition subsequent to defeat an interest vested, and therefore to be construed with all strictness.—The words are “*without consent of guardians*,” in the plural number. The will has appointed two guardians; it has given a special authority to be exercised only by the wife while both are alive; and in default of the wife only, the authority is to be exercised by *guardians*. The case cited of *Peyton v. Bury*, 2 P. W. 626. goes a great way.—The *name* of guardian, as the *name* of executor, survives, but *the authority in question* is collateral to the *office of guardians*.—That case, while it stands, is of weight; but I should have much hesitation to decide upon it. Suppose a power was given to guardians to let an estate for twenty-one years, a special authority, and one should die, I am apprehensive the Court would not, with alacrity, determine that the surviving guardian had not a power to let. When it is said that conditions to defeat an estate are odious, I feel it; but it is a disagreeable argument to guide a decision. What one person may think odious, another may judge of differently; the decision must depend on the feelings of the judge; I should therefore be sorry to go upon the odiousness of the condition.—The position of the will is nonsense. The clause appointing guardians is subsequent to the whole of the provisions in question; the provisions are subsequent to a clause directing the appointment of guardians upon default of the wife. If one daughter had died before the marriage of the other, the clause could have no effect: if the unmarried daughter should now marry more imprudently, the claim could have no effect. This could not have been the intention of the testator. Arguments from supposition of what a testator would have done, if he had been aware of all circumstances, are not very good grounds for giving a construction; but they may be fairly used to assist a dubious *floating construction*. Upon the whole, the intention of the testator throughout his will is very imperfectly and inadequately expressed. It is clear we have not his *whole* intention. I am very doubtful whether the word *guardians*



*Ans* must not refer to other persons than the *guardians* appointed by the will. It seems absurd to suppose that he meant to trust, upon the death of his wife unmarried, the person whom he did not mean to trust in case of her marriage. In conscience, I believe that the circumstance was not in his contemplation at the time he wrote the will.

His Lordship at first directed an account to be taken, without any declaration of the rights of the parties, saying he would further consider the point; but, after some hesitation, declared his opinion that *Mary* was entitled, notwithstanding her marriage; and decreed accordingly (a).

(a) As to the doctrine upon conditions in restraint of marriage, vide *Scott v. Tyler*, post, vol. ii. 431.

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## CONGREVE v. CONGREVE.

*Rolls*,  
8th March, 1781.

THE case arose on the will of *Ann Nicholls*, who gave her real estate to trustees, upon trust, to permit her nephew *T. Congreve*, to receive the rents for his life, and after his death to sell the estate, and divide the money amongst all and every the child and children of *T. Congreve* at the age of twenty-one; she also gave her personal estate to the same trustees, in trust, to divide the same amongst all the children of her said nephew at twenty-one; she directed her nephew to maintain the children out of the rents and profits, and gave the trustees power to apply any part of the interest of the personal estate for the maintenance of the children. She also made a codicil to her will.

Devise to all the children of *A.* at the age of 21: a child born after the death of testatrix shall take.

The question was, whether the plaintiff, a child born after the death of the testatrix, was entitled to a share of her estate: all the other persons were born before the making the will.

The *Master of the Rolls* stated this case, and delivered his judgment to the following effect:

I shall just take notice of a case before Lord *Hardwicke*, where the general rules are laid down, that is, *Ellison v. Airey*, 1 Ves. 111. (which he went through).—In *Hales v. Hales*, before Lord *King*, (cited in the argument of *Ellison v. Airey*,) the will goes to children living at the death, because it speaks from that time, therefore from *Ellison v. Airey*, the rule is to confine the gift to persons living at the death, unless the will speaks otherwise.

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I will mention a case of *Bartlett v. Hollister*\*, before Sir Thomas Clarke, the 25th of May, 1757, the words were much the same as in the present case. One child was born after the testator's death; and the question was, whether that child should take; and Sir Thomas Clarke thought he should. This is the case of a trust; there is nothing to confine it to children born in the testator's life-time, and the interest is a future one.—*Bartlett v. Hollister* is directly in point. It was insisted by the counsel, that the property consisting of real and personal estate, the personal estate should be taken first, though last in the will: but the Court said not. In *Goodwin v. Goodwin*, 3 Atk. 370. there was no decision. † In that case, *Wild's case*, 6 Co. 16 b. was mentioned, which was a devise to A. for life, and after his decease to his children; and it was held all his children should take, "for the intent appears that all shall not take immediately, but after the death of A."—In *Stanley v. Baker*, Mo. 220. *Hitchcock*, possessed of a lease for years, devised it to his two sons, and for default of issue of his sons, that the term should remain to his daughters. The testator died, and afterwards the son died. There were two daughters born at the death of the testator, and one afterwards born. It was adjudged all should take, because he had used the general words *his daughters*. Here is no direction what is to become of the interest of the personal estate, but there is a direction to apply any part for maintenance. This is a strong addition to *Bartlett v. Hollister*, the personal estate is immediately the property of the children, though not immediately given to them; if it were, a power to apply the

\* *Bartlett v. Hollister*, or *Bartlett v. Lynch*, Rolls, 26th May, 1757, William Adams; by will, dated 25th April, 1742, gave to Luke Hollister, and the defendants Lynch and others, a freehold estate, upon trust, for his daughter Hannah for life, remainder to the heirs of her body; and for default of such issue, then, upon trust, to sell and equally divide and pay the money to and amongst all the children of his sisters, the defendant Elizabeth, wife of William Bartlett, and the defendant Mary May, then the wife, and afterwards the widow of John May, when they should attain their respective ages of twenty-one years. The testator died April, 1743, O. S. leaving Hannah his daughter and only child, and heir at law, who entered and died in 1746, unmarried and without issue; Elizabeth, the wife of William Bartlett, had at the testator's death six children, plaintiffs in the cause; and Mary May had at the testator's death seven children, also plaintiffs; Mary May had, after the death of the testator a child, Mary, a defendant. The bill charged, that Mary May was not in esse or ventre sa mere at the death of the testator. She submitted by her answer, that she was entitled to a share with the plaintiffs, as born in the life-time of Hannah Adams, the daughter of the testator, and before the trust for sale took place. His Honour declared, that such of the fourteen children of the testator's two sisters as had attained twenty-one, were each entitled to one-fourteenth part of the money, as there were fourteen children of the testator's two sisters at the death of Hannah, the testator's daughter, without issue; and he directed their shares to be paid accordingly, and the residue to be paid into the Bank, and such of the fourteen children as were under twenty-one were to be at liberty to apply when twenty-one for their separate shares.

† Note. See vide 1 Ves. 227. Lord Hardwicke determined that the after-born daughter took.

interest

interest would be unnecessary. The children are to have the interest with the principal; except what is applied under the power.

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*Isaac v. Isaac*, Amb. 348. before Lord Camden, the 6th of December, 1768, was a bequest *per verba de presenti*, George Stevenson having a niece, and being informed she had children, gave the residue to her children, to be paid into a bank or stock, and the interest to defray the expence of their learning, the principal to be paid to the children at twenty; if no child, the interest to be paid to her or her husband for seven years, and then to be divided between the husband and wife. His Lordship was of opinion that the testator's meaning was, if there was no child at his death, and she had none for seven years, then the money should be divided. In that way there might be children to take. The fact was, there were children. As to *Roberts v. Higman*\*, I think it was right. There were no particular circumstances in the case. In the present case, I think the plaintiff entitled to a share with the other children (a).

\* *Roberts v. Higman*, 12th July, 1779.—Testator devised all his goods and chattels to John Cole and John Higman, to be sold to pay his debts, and the overplus (if any) to be employed for the best use of their children begotten by the testator's daughters Mary Cole and Elizabeth Higman, equally to be divided between them.

The daughters had children born before the will was made, others after, and before testator's death, and others after his death; and the question was, which should take; the Chancellor held, that the division was to take place at the testator's death, and, therefore, that all the children born in the life-time of the testator took, but not those born after his death.

(a) See the cases connected with this subject collected and arranged in a note to *Andrews v. Partington*, post, vol. iii. 461.

(c) ELTON v. SHEPARD.

*Rolls*,  
18th June, 1781.]

MARY TRUBSHAW gave, by will, to trustees £2,000, in trust, to pay the produce to her daughter, Mary Elton, wife of Abraham Elton, esq. mother of the plaintiff, for her own sole and separate use, independent of her husband, and not subject to his debts or control, her receipt alone to be a sufficient discharge for the same; and did authorise, empower, and appoint her said daughter to give and dispose of the said £2,000 as she should, by any will or writing under her hand, direct and appoint: And the testatrix gave the residue of her personal estate to the same

A gift to trustees to pay the produce to A. without limiting the duration of the interest, an absolute gift of the principal.

(c) *Thompson v. Town*, 2 Vern. 319.—*Lascelles v. Lord Cornwallis*, ib. 465. *Maskelyne v. Maskelyne*, Amb. 750.—*Bellasis v. Uthwaite*, 1 Atk. 426.—*Baynton v. Ward*, 2 Atk. 172.—*Thomlinson v. Delighton*, 1 P. W. 149.

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trustees in trust, to pay the produce to *Mary Elton* during her life, her receipt alone to be a sufficient discharge; and after her death in trust, to pay the interest to the testatrix's grand-daughter the plaintiff for life, and in case her said grand-daughter should die leaving any child or children at her death, she authorised and empowered her said grand-daughter to give, bequeath, and dispose of such residue, to such child, or children, in such manner as she should think fit; but if her grand-daughter should die without leaving any child or children at her death, she gave the said residue to the children of her brother *William Shephard*, one of the trustees.

The £2,000 was set apart, and *Mary* the daughter died without having made any appointment. It was claimed by *Mary* the grand-daughter as part of the personal estate of her mother, either as an absolute gift to her, or as undisposed of in the event which had happened, and therefore resulting for the benefit of the mother, as next of kin of the testatrix.

His Honour was of opinion that the first words, in trust, to pay the produce to *Mary Elton for her separate use*, being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment, were merely an anxious expression of the intention of the testatrix that she should have an uncontrollable power of disposing of the fund (a).

(a) A bequest of the interest of personality without limitation passes the whole property, as an indefinite gift of the dividends, carries the absolute property of stock. *Philipps v. Cham-*

*berlaine*, 4 Ves. 51. *Page v. Leapingwell*, 18 Ves. 463. *Adams v. Armitage*, Coop. Rep. 284. *Stretch v. Watkins*, 1 Madd. Rep. 253. *Clough v. Wynne*, 2 Madd. Rep. 188.

Lincoln's-Inn  
Hall, 3d July,  
1781.

## LISLE v. LISLE.

Appointment  
(under a power)  
by will is revoc-  
able by a subse-  
quent appoint-  
ment by deed,  
though no power  
of revocation is  
reserved by the  
will.

BY settlement, made previous to the marriage of *Charles Lisle* and *Ann* his wife, certain stocks and securities were agreed to be transferred, and were afterwards actually transferred to trustees, in trustees, after the death of *Charles Lisle* and his wife, for all their children, in such manner as they or the survivor should, by writing, appoint. *Charles Lisle* died, having made no appointment; after his death Mrs. *Lisle* made her will, and thereby appointed the trust, stocks, and securities among her children. Afterwards, upon the marriage of *Susannah*, one of her daughters, she by deed-poll appointed part of the trust-stock to that daughter, in full of her share of the trust-funds, unless either of her sisters should die under age and unmarried, appearing by this expression to refer to the appointment she had made by her will, though she took no notice of that appointment, and the appointment by the deed-poll,

deed-poll, gave a greater share to *Susannah* than she would have taken under the will. It was contended that the present appointment, being by writing merely, without any mention of a power of revocation, and no power of revocation being contained in the will, it was irrevocable, and the subsequent appointment consequently void. On the other side it was insisted, and the *Chancellor* was of opinion that the first appointment being by will, was made by an instrument in its nature revocable, and that the subsequent appointment was therefore good, and he decreed accordingly (a).

(a) Vide *Oke v. Heath*, 1 Ves. 135. *ib.* 612.—Sugd. on Pow. 321. Et vide *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 77. *Southby v. Stonehouse*, *ib.* 612.—Sugd. on Pow. 321. Et vide *Laurence v. Wallis*, post, vol. ii. 319.

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LIST.

## (d) BARNARD v. LARGE.

*Rolls*,  
3d July, 1781.

THE plaintiffs in this cause were *Thomas Collier Barnard* and his eldest son; the defendants were *Large*, a trustee in the will of *Thomas Barnard*, and *J. Wall* remainder-man in fee under that will; the bill stated that *Francis Barnard*, by his will, devised freehold and copyhold estates to the plaintiff, *Thomas Collier Barnard*, for ninety-nine years, if he should so long live, with the remainder to the defendant *Large* and his heirs, during the life of *Thomas Collier Barnard*, in trust to preserve contingent remainders, with remainder to the first and other sons of *Thomas Collier Barnard* in tail-male; with remainder to *J. Wall* in fee; that *Thomas Collier Barnard* had issue only one son, the co-plaintiff, who was tenant in tail under the will, and had attained twenty-one, that the plaintiffs were desirous of suffering a recovery, and limiting the estate so as to preserve the contingent remainders to the second and other sons of *Thomas Collier Barnard*, but the defendant *Large* having refused to concur in making a tenant to the *præcipe*, a recovery could not be suffered; and the bill therefore prayed that the trustee, the defendant *Large*, might be decreed to join in making a tenant to the *præcipe* for the purpose of suffering a recovery; the plaintiffs submitting to declare the uses of the recovery to the second and other sons of *Thomas Collier Barnard*, by way of contingent remainders, as limited by the will, and to a limitation of an estate to trustees for the purpose of supporting and preserving those contingent remainders.

The Court will not compel a trustee to preserve contingent remainders to join in a recovery, unless to continue the estate, or under very particular circumstances.

His Honour, having taken time to consider the case, now delivered his opinion; he observed that the objects of the will were the first taker, *Thomas Collier Barnard*, his first and other sons, and their issue male, and the remainder-man in fee, and that the case should rely upon the will. He then proceeded to the following

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(d) Ambl. 774, S. C.

effect;

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effect: By the order of law a recovery cannot be suffered by the tenant for ninety-nine years, and the tenant in tail, without the concurrence of the trustee; the trustee refuses to concur, and the bill is brought to compel him.—The sole question therefore is, whether this is a case in which the Court ought to compel the trustee to concur; for this purpose it is necessary to consider the nature of the trust: All the persons claiming under the will take as volunteers, and are all objects of the trustees bounty, the last remainderman as well as the first-taker. Trustees to preserve contingent remainders are here appointed for two purposes: first, to preserve the estate against the father's power to destroy it; and secondly, to prevent the injury of any improper influence of the father over the son, to induce him to join in destroying the entail created in cases where he ought not to join; there is, therefore, necessarily a discretion in the trustees, a discretion which if they use improperly the Court will punish them; and if they refuse to exercise their discretionary power upon a reasonable occasion the Court will compel them to do it. In so doing, the Court takes upon itself the exercise of that discretion which ought to be exercised by the trustees; but the Court has a discretion in what cases it will do this. There is a discretion between punishing trustees for joining in the destruction of contingent remainders and compelling them to join; the Court proceeds according to the nature of the discretion given to the trustees, treating it as an honorary trust; it will be proper therefore to see by what rules the discretion of the trustee is directed, in what cases he has been considered as warranted in joining, and in what not. The rules seem sufficiently established, the trustee, though properly appointed only to preserve contingent limitations, is in effect a trustee for all vested as well as contingent remainders, and has been so considered; but with respect to vested remainders, if they have been to remote relations upon settlements where the persons to whom they were limited were not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail, desiring a reasonable benefit consistent with the intentions of the creators of the limitations, their pretensions have not been much considered: Here all take as volunteers, and all are equally to be considered. The first case which has occurred is in 1693, 2 Vern. 303 (a). This seems to have been a case of necessity, the estate was originally an equity of redemption merely, the mortgage could only be paid off by sale, it was therefore necessary to sell, or all would be lost. The next case is *Pye v. Gorges*, Pr. Ch. 308. 1 P. W. 128. 2 Salk. 680. in which the joining of trustees to destroy contingent remainders was considered as a breach of trust. The next is the case of *Tipping v. Pigot*, 1 Eq. Ab. 385, in which the Court refused to relieve against the

(a) *Platt v. Sprigg*—but this was not the first—*Daries v. Wild*, 1 Vern. 181. 1 Eq. Ab. 386, preceded it.



act of trustees in favour of a person who was not within the consideration of the settlements. In the case of *Else v. Osborne*, 2 Vern. 754. 1 P. W. 387. *Michaelmas* 1717, the Court approved the conduct of trustees, joining with the first son tenant in tail, to destroy contingent remainders. And in the case of *Frewin v. Charlton*, Eq. Ab. 386, the trustees were directed to join, but this was in contemplation of a marriage, and to remedy a blunder in the settlement, by which the term for securing daughters portions was limited, subsequent to the estates tail to the sons. The next case was *Winnington v. Foley*, 1 P. W. 536, in which the Court, for the purpose of a new settlement, and in contemplation of a marriage, decreed the trustees to join; but in *Townshend v. Lawton*, before Lord King in 1726. 2 P. W. 379. Sel. Ca. in Ch. 71, the Court refused to interfere. The last case which has been mentioned is *Woodhouse v. Hoskins*, 3 Atk. 22(a); in this case Lord Hardwicke refused to compel the trustee to join, not thinking it a case in which the trustee ought to be compelled, and he remarked that the case of *Winnington v. Foley*, was to make a marriage settlement, and so to continue in effect the uses of the old settlement, and after the uses of the new settlement were served the estate was limited to the old uses. From this view of the cases determined the reason of them seems to be, that when the eldest son tenant in tail is of age, and about to marry, and thus continue instead of destroying the purposes of the settlement; and in some cases, where there has been particular distress, under particular circumstances which ought to have induced the trustees to act, there the Court has interfered; but where no such circumstances have occurred the Court has refused to interfere. In the present case I am called upon to disturb the testator's disposition, and for what reason? merely to disturb it. No other object is offered, why then disturb the testator's will? let the law take place, dismiss the bill with costs (b).

(a) See this case stated by Lord Eldon, from a MS. note, 16 Ves. 308.

(b) The present and all the prior cases are discussed by Mr. *Fearne*, (C. R. 331,) and most elaborately and ably reviewed by Lord Eldon, in *Moody v. Walters*, 16 Ves. 283. Vide also *Biscoe v. Perkins*, 1 V. & B. 485. It is settled that these trustees are honorary trustees, and that they cannot be compelled to join in destroying contingent remainders. In what cases they would be directed to do so is a question of such difficulty, that Lord Eldon has declared that he could not reconcile the cases upon it, 1 Ves. & Bea. 492. Mr. *Fearne* enumerates three classes of cases in which the Court has done so, viz. under extraordinary pressure to discharge prior incumbrances: in favor of creditors, where the settlement was voluntary: for the advantage of the

persons who were the first objects of the settlement.

It seems clear, that trustees joining, before the first tenant in tail is twenty-one, would be guilty of a breach of trust: but how far they would be so in many cases, where a Court would not direct them to act, is left in great uncertainty; Lord Eldon seemed not to approve of the extreme caution of Mr. *Fearne*, who recommends trustees never to act without the direction of the Court; and cited a case not in print, in Lord Lansdowne's family, upon which several opinions were taken, the result of which was, that upon the circumstances stated, a court of equity would not compel the trustees to join; but that they might safely do so, if they thought the proposed arrangements were such, as in a fair and reasonable

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reasonable view, the trustees would accede to in a settlement of their own. Upon a bill filed, Lord Kenyon held, that he ought not to compel them.

The doctrine upon this subject is extremely inconvenient. Trustees are exposed to the vexatious demands of families, to the difficulty of determining whether a court of equity will direct them to join, or will interpose to defeat the act and make them responsible. Instances of extreme family exigency may occur, where a Court would refuse to direct the destruction of contingent remainders, and in which a timid or hostile trustee, by shelter-

ing himself under its inactivity, may work the greatest mischiefs. In many such cases it should seem to be the duty of the trustee not to preserve but to destroy the contingent remainders: at least he may be safely advised that as long as the doctrine of the Court of Chancery remains so doubtful, that the most profoundly learned person that ever presided in it declares himself unable to deduce the true principle from the cases, (1 Ves. & Bea. 491.) he would not be held chargeable for an honourable and conscientious exercise of his discretion.

4th July, 1782.

## DEVISME v. MELLO.

S. D. gave £1,000 to purchase stock, the interest to M. for life, then to W. for life; at his decease to testator's godson S. and at his death to be divided among his brothers equally; S. was dead at the time of the will made; a son of W. born after testator's death, who would have been a brother of S. had he lived, shall take a share in the £5,000. The testator also, by a codicil, gave £4,000 to L. for life, and in case he had no children, to revert to W.'s children; a daughter of W. who was alive at the time of the codicil being made, but died before W. had a vested interest, which was held transmissible to her representative.

STEPHEN DEVISME, of Canton, in China, made his will, 12th December, 1768, and appointed his brother *Lewis Devisme* and the defendant *Mello* executors. He made a codicil, 20th March, 1770, taking notice of his will, and that he had thereby disposed of most part of his effects, and that he had since increased his fortune, and by the codicil he gave as follows; viz. "I give and bequeath a further sum of £5,000 sterling to purchase stock, and the interest to be paid to my mother *Marianne Devisme*; at her death the interest to be paid to my brother *William Devisme*, and at his demise to my godson *Stephen*; at his decease, if before he is of age, to be divided among his brothers equally." And another bequest is contained in the codicil as follows: "To my brother *Lewis Devisme*, £4,000 to buy stock, to enjoy the income during life, and in case he does not marry and leave children, to revert to my brother *William*'s children in equal parts." And he gave the residue of his whole estate real and personal to his brother *William Devisme*, and appointed him sole residuary legatee of his codicil.—*Stephen Devisme* the testator died 2d November, 1770.—*Lewis Devisme* renounced probate of the will and codicil, *William Devisme* and *Arnold Mello* proved.—*Stephen Devisme*, the godson of the testator, died an infant of four years of age, 26th February, 1770, in the life-time of his father *William Devisme* and of the testator, and before the date of the codicil, having at the time of his death two brothers, the plaintiffs *William* and *James*, who were his only brothers at the time the testator made his codicil, and at the time of the testator's death.—The plaintiffs *William* and *James*, and *Elizabeth* and *Sophia Devisme*, who died 4th January, 1774, were the only children of *William Devisme* testator's brother, living at the time the testator made his codicil and at his decease; *Lewis Devisme*, brother of the testator, died 4th September, 1776, unmarried and without issue; at his death *William* had no children except the plaintiffs.—*Marianne* the mother died 16th February, 1779.

1779.—*William Devisme*, the father of the plaintiffs, died 16th February, 1781, leaving the plaintiffs and the defendant *Andrew Devisme*, who was born 21st October, 1778, after the death of testator *Stephen Devisme*, and after the death of *Lewis Devisme*; the family pedigree therefore stood thus:

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MARIANNE DEVISME,  
died 16th February, 1779.

STEPHEN,  
Testator,  
died 2d November,  
1770.

LEWIS,  
died 4th September,  
1776.

WILLIAM,  
died 16th January,  
1781.

WILLIAM,  
Plaintiff.

JAMES,  
Plaintiff.

ELIZABETH,  
Plaintiff.

SOPHIA,  
died  
4th Jan. 1774.

STEPHEN,  
Godson,  
died  
26th Feb. 1770.

ANDREW,  
Defendant,  
born  
21st Oct. 1778.

The family had set apart the two sums of £5,000 and £4,000, and applied them in the purchase of stock, and the produce of the first being £5,500, 3 per cent. annuities, stood in the names of *Mello* and *Blaquiere*, and the second being £4,400, 3 per cent. annuities, in the name of *Mello* only.

The bill prayed that the rights and interest of plaintiffs in the £5,500 and £4,400, annuities, purchased with the £5,000 and £4,000 might be ascertained, that the shares of the plaintiffs *William* and *James*, who had attained 21, might be transferred and paid to them, and the share of the plaintiff *Elizabeth* secured for her benefit.

At the hearing of the cause it was contended for the plaintiffs, that they alone were entitled to the whole of both funds; that *Andrew Devisme* being born after the death of *Stephen* the godson and of the testator, could not take any part of the £5,000 by the description of a brother of *Stephen*; and that being born after the death of *Lewis Devisme*, as well as after the death of the testator, he could take nothing in the £4,000. That *Sophia* having died in the life-time of *Lewis* could take nothing in the £4,000, and as *Stephen* the godson died in the life-time of the testator, no interest in that sum passed to him; nor was the share which he would have been entitled to, if living, to be considered as lapsed and falling into the general residue.

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On behalf of the defendant *Andrew Devisme*, it was contended that he was entitled to a share of the £5,000, having been born before the fund was distributable. It was insisted that in this case the

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the disposition of the £5,000 in case of the death of *Stephen* the godson, though in words to the *brothers of Stephen*, yet was to be considered as a disposition in favour of *sons of William Devisme* the brother of the testator; and that, in that character, the testator meant a bounty to the plaintiffs *William* and *James*; and that therefore though *Andrew* was never, strictly speaking, a *brother of Stephen*, he might nevertheless take under that designation. That the word *brothers*, as well as the words *children* and *sons*, was general, and would extend to *all* brothers, unless it appeared the intent of the testator was to use it in a limited sense. That it had been the aim of courts of justice to limit such general words for the sake of convenience; but their guide in all cases had been the intention of the testator, where that intention was consistent with the rules of law. Where a gift *was immediately* to take effect, *in all its consequences* at the death of the testator, there the persons who answered such general description at the time of the testator's decease were alone to take, because *that must* be the intention of the testator; but where a gift was not immediate, there it was not so evident that the testator meant to control the extended meaning of general words, and they might have their operation at a time subsequent to his death. If, therefore, the thing given was subject to circumstances which prevented an immediate distribution, as a prior interest, a power of appointment, or a contingency, general words used in the gift might have their full latitude till the gift actually took effect by division of the money, provided the intention of the testator did not appear to the contrary; and they might operate to delay the division, if the intention of the testator to continue this extended meaning to a more distant period was declared, and that intention was consistent with the rules of law. In support of the first, that the word *brothers of Stephen* was to be construed as describing sons of *William*, it was urged that the words were used merely as words of relation to *Stephen*, whose name was the antecedent; but that it was obvious, from the terms of the bequest, that the object of the testator's bounty in the whole bequest were *William*, to whom the property was given for life, and his sons, that there was a clear intention to prefer *Stephen* as the godson of the testator, to the other sons of *William*; but, in case *Stephen* could not take, there was no intention of further preference of any son of *William*: That, from the state of *William's* family, the testator must have had in contemplation the probability of the birth of other sons; and that consequently *Stephen* might have other brothers besides those in being, and that it could not have been his intention that the death of *Stephen*, sooner or later, if he could not take the benefit, should have any operation on the extent of the provision intended for other sons of *William*. To shew the ground for the rest of the argument several cases were cited.

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In

In support of the assertion that general words, in a bequest, were to be construed as used in their most extended sense, unless the intention of the testator appeared to the contrary, or the rules of law and the necessity of preventing a suspension of rights obliged the Court to decide against the testator's intention, the cases of *Bartlet v. Lynch*, at the Rolls, 26th May, 1757, (stated ante, p. 530, note), and *Congreve v. Congreve*, (ante, p. 530.) *Roberts v. Higman*, (ante, p. 531, n.) *Baldwin v. Karver*, (since reported by Mr. Cowper,) after-born children were let in to take, were cited from manuscript notes. From the printed books several cases were also mentioned, to shew that general words might have their full operation delayed until the time when the fund was to be distributed. Thus in *Harding v. Glyn*, 1 Atk. 469. where the testator gave his personal estate to his wife, desiring her at her death to dispose of the same among his nearest relations, and she made no appointment; it was determined that the property vested in such relations of the testator as were his next of kin at the death of his wife, when the distribution was to take place. So in *Lord Teynham v. Webb*, 2 Ves. 198. the character of younger son was necessary to continue till the time of payment. Upon the same principle the case of the *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. was determined, where Lord Sunderland gave £30,000 to his wife for her life, and after her death to be distributed among such of his children, and in such proportions as she should by deed or will appoint. She, by will, appointed, and two of the appointees died in her life-time. It was determined that appointment to them could not take effect. In the case of *Coleman v. Seymour*, 1 Ves. 209. it was determined that a younger child, become an elder after the death of the testator, should take upon a gift to younger children; but there the gift was immediate; and Lord Hardwicke observed, that the construction might have been different if the money had been given to the mother for her life. And in *Horsley v. Chaloner*, 2 Ves. 83. the gift being immediately to be paid to the children at 21, the Master of the Rolls held a child born after the death of the testator should not take; but in *Graves v. Boyle*, 1 Atk. 509, where a life interest in the property was first given, it was determined that children born after the death of the testator, during the continuance of the life interest, should take under general words. In *Maddison v. Andrew*, 1 Ves. 57. where the testator gave £300 to the children of his sister Sarah, to be equally divided, share and share alike, at their ages of 21, or marriage, and failing the share of any, to the survivor; and failing her, shares of all to another sister, Grace; Sarah having only one child at the time of the will, and the testator having given it to children, with benefit of survivorship, and given it over to another family, upon an event which he must have intended to be the failure of all the children of Sarah, Lord Hardwicke thought this bequest,

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quest, though *immediate*, must be construed to be for the benefit of all the children *Sarah* might have.

On behalf of the defendant *Elizabeth Devisme*, as administratrix of her daughter *Sophia*, it was contended, that *Sophia* took a transmissible interest in the £4,000 under the words "to revert to my brother *William's* children in equal parts." *Sophia* being living at the death of the testator, died before *Lewis Devisme*, the tenant for life; for though the bequest was subject to a contingency, that contingency did not affect the capacity of *Sophia* to take at the death of the testator, if the contingency had then happened, and therefore according to *King v. Withers*, For. 117. and several other cases, her interest, though contingent, was transmissible to her representative.

*Lord Chancellor* was of opinion that he was obliged to say the words in the bequest of £5,000 to brothers of *Stephen* were not confined to those who were his brothers at the time of making the codicil: that the testator must have had in contemplation other sons coming into being; that the intention of the testator appeared to be to make an aggregate description of a part of the family of *William* by the name of brothers of *Stephen*, as if he had used the words *male children* of *William*, that he made use of the word *brothers* merely by relation to the antecedent, the name of *Stephen* used in the former part of the bequest, and that he could not otherwise have described the sons of *William* but by a circumlocution; he therefore declared that *Andrew*, being born before the time of distribution of the fund, was entitled to a share of the £5,000. He was also of opinion that the representative of *Sophia* was entitled to a share of the £4,000 \* (a).

\* Note. Vide post, *Gilmore v. Severn*,—and *Viner v. Francis*, vol. ii. p. 658.

In the case of *Singleton v. Singleton, Gilbert, and others*, 24th February, 1784, *Elizabeth Palmer*, by will, 11th June, 1757, gave her real estates to trustees for five hundred years, upon trust, for raising £200, for better securing her debts, and other purposes, with remainder to trustees for one thousand years, in trust, to repay the £200, and raise annuities, and subject to the terms; she gave the estate to *all and every the child and children* of her brother *Thomas Gilbert*, and the heirs of the body and bodies of such child or children, as tenants in common, if more than one, in equal proportions; and in case of failure of issue of the bodies of such child or children, whose issue should so fail, to *every the remaining child*

(a) *Lord Alvanley*, in *Godfrey v. Davis*, 6 Ves. 49, observed, that this case, which seems to have settled the law upon the subject, received great consideration from *Lord Thurlow*. It establishes, that where a testator gives any legacy or benefit to any person, not as *persona designata*, but under a qualification and description at any particular time, the person answering that description at that time is the person to claim;

and if there are any persons answering the description, they are not to wait and see whether any other persons come in *esse*: but it is to be divided among those capable of taking, when, by the tenor of the will, he intended the property to vest in possession. See the general cases upon this doctrine collected and arranged in a note to *Andrews v. Partington*, post, vol. iii. 401.



child or children of the said *Thomas Gilbert*, and to the heirs of the body and bodies of all and every such child and children, if more than one, to take as tenants in common; and if there should be a failure of issue of all such children, or if there should be but one such child, then to such remaining or only child; in default of such issue, to her brother the said *Thomas Gilbert* for life, with remainders over: And she directed the remainder of her personal estate to be placed at interest, and subject to annuities, and she gave it to all and every the child and children of her brother *Thomas Gilbert*, who should live to attain twenty-one, such children, if more than one, to take equally, if only one, then such only child, and if there should be no such children, or none who should attain twenty-one, then she desired her personal estate, and the residue of the rents and profits of her real estate, to be distributed amongst her next of kin. *Thomas Gilbert* had two children, *Richard* and *Elizabeth*, born before the death of the testatrix, and three children, *Susannah*, *Thomas*, and *Edward*, born after the death.—The bill was brought by the plaintiff, the daughter of *Susannah*, who died before twenty-one, claiming the benefit of her mother's supposed share of the real estate of the testatrix, as claiming the share as heir of the body of her mother.

*Lord Chancellor* was of opinion, that there was no point of time in this case to which the words *all and every the child and children* of *Thomas Gilbert* could be confined, except the death of the testatrix, and therefore determined that the plaintiff's mother *Susannah*, who was born after the death of the testatrix, could have no share.

*Ayton v. Ayton*, Rolls, 14th February, 1787. *George Lee*, by will, dated 10th October, 1762, bequeathed to his wife *Mary Lee*, the residue of his real and personal estate for life; and after her death he gave the same to the children of *Mr. John Ayton* and his wife *Jane*, to be equally divided amongst them the said *Jane Ayton*'s children, and not any children of any other marriage by either party.—The testator died 15th December, 1762, without issue.—*Mary Lee*, his widow, died 11th April, 1763.—At the death of the testator and his widow, *John Ayton*, *Susannah Ayton*, and *Mary Ayton* (since dead), were the only children of *John* and *Jane Ayton* then born, but they had afterwards three other children, *Hannah*, *Jane*, and *Elizabeth*, all born after the death of *Mary Lee*, the wife.

His Honour (*Sir Lloyd Kenyon*) declared, that the interest in the residue of the testator's personal estate vested absolutely in the three children of *John* and *Jane Ayton*, who came into esse during the life of *Mary Lee*, and that those born after were not entitled to a share.

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(c) The Hon. HENRY NEVILLE, JOHN ROBIN- } Plaintiffs.  
SON, and HENRY SHELLEY, Esquires, - - }

JOHN WILKINSON - - - - - Defendants.

Injunction granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiffs (on a treaty of marriage with his daughter) that there was no such demand existing.

THE plaintiffs filed their bill and the following case appeared on the defendant's answer:

In June 1777, the plaintiff *Neville*, who was the son and heir apparent of Lord *Abergavenny*, became acquainted with the defendant, who was an attorney, and they had several transactions together, the principal object of which was the raising money to supply Mr. *Neville's* necessities.

In June 1781, Mr. *Neville* having paid his addresses to marry the daughter of the plaintiff *Robinson*, the defendant was requested by Mr. *Neville* to make up a state of his affairs to lay before Mr. *Robinson*, which the defendant did to the amount of £26,000, including demands of the defendant on Mr. *Neville* to a considerable amount; and meetings were had to settle this state of debts between *Neville* and the defendant, and *Butcher*, another person employed by *Neville*, and who had a considerable demand on *Neville*; and in the course of their conversations it appeared that the demands of *Butcher* were stated below their real amount, and that there were debts not included in the amount; but *Neville* represented to the defendant and *Butcher*, that he had assured *Robinson* that his debts in the whole did not exceed £18,000, and that he was very sure, if *Robinson* knew that his debts were so enormous, he would hesitate consenting to the marriage; although he was sure, after the marriage had taken place, that he would pay the full amount of *Neville's* debts, that he had obtained the consent of the lady and her friends, and of his friends; that he should be unhappy and ruined unless the marriage took effect, and that he saw no other mode of effecting it but by persuading the defendant to forego making a claim of his whole debt due to him from the plaintiff *Neville*, and by persuading *Butcher* to forego claiming a part of his demand. The defendant was prevailed upon by the entreaties of *Neville* to conceal his debts from Mr. *Robinson*, and to omit the same in the amount of the debts of *Neville*, to be made out and delivered to Mr. *Robinson*; having received from *Neville* assurances that the debt due to the defendant should be paid or considerably reduced out of the income

40. *Wilmot v. Woodhouse*, post, vol. iv. 227.—*Eastabrook v. Scott*, 3 Ves. 456.

which

which his father Lord *Ahergavenny* and Mr. *Robinson* had agreed to allow him; and that *Robinson* had agreed to give *Neville* £50,000, with his daughter, and to make his annual income £5,000 a year. An account was delivered by the defendant to *Neville* of money received and paid by the defendant in some annuity transactions, which was examined by Mr. *Atkinson*, as a friend of Mr. *Robinson*, but not finally settled; and particularly the defendant told *Atkinson* that he had a considerable demand on *Neville*, for business done in his profession, and for money expended in his business; he was then asked by *Atkinson* if he had any other demands on *Neville*, and said he had not, in pursuance of his promise to *Neville* to conceal his demand from *Robinson*.

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On the 4th of October, 1781, Mr. *Neville* was married to Miss *Robinson*, and the fact was, (though the answer denied any knowledge of it,) that by indenture 29th September, 1781, previous to the marriage, it was declared that a sum of £18,000 paid into the hands of a banker in the name of the plaintiffs *Robinson* and *Shelely*, and mentioned in the settlement on the marriage of Mr. *Neville* and Miss *Robinson*, should be applied to redeem the annuities and pay the debts granted and contracted by Mr. *Neville* previous to his marriage, and that if there should be a surplus it should be paid to trustees in the settlement. After the marriage the £18,000 was applied in discharging demands on Mr. *Neville*, together with a further sum advanced by Mr. *Atkinson* for that purpose, and the defendant was employed to pay several of those demands consisting of tradesmen's bills, he also paid to a person who lived with Mr. *Neville* before his marriage £417 which was repaid by Mr. *Atkinson*, and the defendant on this occasion refusing to give a receipt in full of all demands, was asked by *Atkinson* if he had any other demands, and he said he had not.

After these transactions the defendant claimed of *Neville* a debt to the amount of £4,758, 16s. 6d. exclusive of interest, and also exclusive of his demand for his fees and disbursements in business, and it appeared that he had a bond from *Neville* for £1,000 in part security for his demands; part of this demand was for money advanced subsequent to the marriage. The bill prayed a general account, offering to pay what, if any thing, should appear justly due, that the bond might be delivered up, and an injunction; and it appeared to found a claim to this relief, on suggestions that the demand of the defendant was not in its origin just, rather than upon the ground of fraud in the concealment, by the defendant, of his demand on the plaintiff *Neville*.

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Upon the answer, a motion was made by Mr. *Attorney-General* (*Kenyon*) for an injunction, and he founded his motion on the ground

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ground of fraud, he principally relied on a case of *Turton v. Benson*, 1 P. W. 496. and *Redman v. Redman*, 1 Vern. 348.

Mr. *Scott*, on the other side, contended that this case differed from any former case. He considered, and it was admitted, that the defendant's demands in the way of business and for money advanced since the marriage were indisputable; and that the only doubt was as to the debt due to the defendant before the marriage, which it was alledged had been fraudulently concealed from Mr. *Robinson* to induce him to consent to the marriage. With respect to this demand, he endeavoured to distinguish the case of the defendant from any case apparently similar which had been before the Court; insisting that these cases had either been where the consideration of the original contract was bad, as marriage-brocage bonds, or they had been where a parent had bargained for his child upon an article in which he had been deceived; but in this case the original contract was good, as the fairness of the defendant's demand was not disputed, and it did not appear that Mr. *Robinson* had been deceived in an article upon which he had bargained in behalf of his daughter, as it did not appear that Mr. *Robinson* had made the amount of the debts of *Neville* a positive condition in the treaty for the marriage.

In order to found the injury, it ought to appear from the answer,

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First, That in point of fact Mr. *Robinson* did make it a term agreement that Mr. *Neville's* debts amounted only to £18,000:

Second, That the defendant knew that he so did:

Third, That knowing this, the defendant had conveyed to *Robinson* a misrepresentation, under the influence of which *Robinson* had actually agreed.

*Lord Chancellor* had at first considerable doubts; but after looking into the cases with considerable attention, he delivered his opinion to the following effect:

He observed that Mr. *Scott* had attempted to distinguish this case from any of the former cases apparently similar, upon this ground: that in all those cases the parent had stated an article in which he had been deceived, and had bargained upon that article; here the defendant confessed a confederacy to cheat *Robinson*, that *Neville* had told him that he had represented his debts to *Robinson* as not exceeding £18,000, and that he was sure that if *Robinson* knew the amount of his debts he would hesitate consenting to the marriage; but *non constat* that *Robinson* had ever insisted that £18,000 should be the extent of the debts of *Neville*. His Lordship said he could not make the distinction; he would not lay it down as a rule that fraud, in cases of this nature, must be upon

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an article expressly contracted for. If any man upon a treaty for any contract will make a false representation\*, by means of which he puts the person bargaining under a mistake upon the terms of bargain, it is a fraud; it misleads the parties contracting on the subject of the contract. It has been said here is no evidence of actual fraud on *Robinson*, but only an admission of a combination to defraud him. A court of justice would make itself ridiculous if it permitted such a distinction: misrepresentation of circumstances is admitted, and there is positively a deception. His Lordship then adverted to the case of *Gale v. Lindo*, 1 Vern. 475, and observed that there, upon a treaty for a marriage, the woman not having so great a portion as the man insisted upon, prevailed upon her brother to let her have £160 to make up her portion, and gave him a bond for repayment of it: the marriage was had; and the husband, who knew nothing of the bond, died without issue: the wife survived, and after her death and the death of the brother, the defendant, his executor, put the bond in suit against the plaintiff, her executor: the bond was there set aside in her favour; a bond given by herself and sued against herself, that is against her representative. A quere is put by the Reporter; if the condition of the bond had been, that in case the woman survived her husband that she should pay it, whether she could have been relieved: his Lordship thought this would have made no difference: the principle, he observed, on which all those cases had been decided was, that faith in such contracts was so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain but even loose by it: he then observed upon the cases in which it had been determined, that upon a criminal act, a person who was *particeps criminis* could not be relieved in a court of justice; and particularly the case of *Tomkins v. Barnett*, 1 Salk. 22. and Skin. 411. which was an action of *indebitatus assumpsit*, by a person who had paid money on an usurious contract, against the person who had received it. This he observed remains in the books and is cited; but has been departed from in point of principle and application: and to shew this, he mentioned the case of *Astley v. Reynolds*, Str. 915, which was an action against a pawnbroker for taking more than legal interest, and *Moses v. Macfarlan*, before Lord Mansfield, 2 Burr. 1005, and *Wilkinson v. Kitchen*, Lord Raym. 89. which was an action of *indebitatus assumpsit* for £70 given by the plaintiff, who was committed on two indictments for clipping, &c. to the defendant, a Newgate solicitor, to procure his discharge, and for the defendant's pains: not being prosecuted, he brought his action for the whole £70, and upon the trial the question was, whether money given to a man to be expended in an ill use, might be recovered by the giver who was *particeps criminis*;

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\* See *Pearson v. Morgan*, post, vol. ii. p. 388.

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and it appearing that the money had been disposed of in bribes, a verdict was given for the plaintiff: and Sir *B. Shower* cited a case where a bribe was given to a custom-house officer for exempting goods from payment of custom, which being discovered, and the goods seized, the party recovered his money in *indebitatus assumpsit*. This however appears to be against the assertion of Lord *Hale*, at the close of the case of *Tomkins v. Barnett*, Skin. 412. His Lordship, founding himself on the case he had mentioned, declared his opinion, that in all cases where money was paid for an unlawful purpose, the party, though *particeps criminis*, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before (a). And he considered the rule as now clear;

(a) This passage is cited by Sir *William Grant*, in *Osborne v. Williams*, 18 Ves. 283; in which case, however, his Honour found it unnecessary to lay down so broad a rule. It seems, however, that the general maxim, that in *pari delicto melior est conditio possidentis*, does not always prevail: or at least that Courts, both of law and equity, have held that two parties may concur in an illegal act, without being in *pari delicto*; and accordingly, in *Osborne v. Williams*, and in several other cases, some of which are there cited, the party illegally obtaining a benefit has been decreed to refund. In cases of relief, upon grounds of public policy, the objection, that a party does not deserve the relief, as being *particeps criminis*, never prevails; the public interest requiring that the relief should be given, and accordingly it is given to the public through that party. *Hatch v. Hatch*, 9 Ves. 298. *Shirley v. Martin*, cit. ib. also 3 P. W. 75, n. and more fully in *Roche v. O'Brien*, 1 Ba. & Be. 358. *Lord St. John v. Lady St. John*, 11 Ves. 536.

There is another class of cases, the principle of which seems recognized by the Treatise on Equity, (lib. 1. c. 4. s. 6.) in which relief has occasionally been given upon a principle somewhat analogous to that upon which the above cases have been decided, though considerable doubt may be entertained as to the correctness of the application of it: viz. those cases in which a party does not come to be relieved from the effect of an illegal transaction, but to obtain, through the assistance of a

Court of Equity, an account of the profits of it.

Thus, in a case in a collection of reports in the *Hargrave MSS.*, where the plaintiff drew a prize of £1,000 in an illegal lottery, which had been set up by defendant. It was objected that there could be no relief in equity, the plaintiff and defendant being equal offenders, as two gamblers or pirates. Lord *Harcourt*, however, thought the offences not equal, and that the act of Parliament ought not to shelter the defendant from satisfaction, but as the lot was made up of two houses, valued at £800, and a silver cistern, valued at £200, he decreed the houses should be taken at that value, though they were only worth £600, because the adventurers might have resorted to them, and seen whether they were of that value or not; but as to the cistern, that never having been bought by the defendant, it was decreed that he should pay the £200. So, in *Nash v. Ash*, 1 Eden, 378, Lord *Northampton* directed an issue to try whether there had been an agreement to carry on the game of E. O., and a contribution for that purpose. In *Watts v. Bulles*, 3 Ves. 612, Lord *Rosslyn* expressed an opinion, that both smuggling transactions and illegal dealings in stock, might be brought into account, and decreed an account of the profits of a partnership to be jointly concerned in illegal insurances. It is to be observed, however, that the decision in that case has been expressly over-ruled by Sir *W. Grant* in *Knowles v. Haughton*, 11 Ves. 168.

and



and mentioned a case of *Bromley v. Smith*\*, before Lord *Macclesfield*, 1760, where a bribe was given to a creditor of a bankrupt to induce him to sign a certificate: he also mentioned, upon the point before him, a case of *Montefiore (a)*, in 1762, from Mr. *Filmer's* notes, in the hands of Mr. *Attorney-General (Kenyon)* where, in order to procure a marriage, a brother of the intended husband represented that he was indebted to the intended husband on a partnership account, and gave a note for £1,730, to be shewn to the parents of the wife, to induce them to enter into the contract; and the brother gave a bond of indemnity: no part of the money was settled on the marriage, and the note was their inducement to the marriage: there were afterwards many disputes between the brothers, and at length they referred their dispute to arbitration: the arbitrators thought that the note was given upon no consideration, and disallowed it in their account: the Court reversed the award on that single ground, because where one brother had given to the other the note for £1,730, to enable him to make a contract of marriage, he could not revoke it; it amounted to a contract to perform what he had done. His Lordship was, upon these grounds, clear that Mr. *Neville* himself was entitled to relief: he had doubted before, on what had been said by Lord *Macclesfield*, that the father of a child, in such a case, had an interest to see that the property of the husband was such as it had been represented to be, but he now thought clearly with him. He was of opinion that an injunction should be awarded to restrain the defendant from proceeding to recover any debt due before the marriage of Mr. *Neville* (except his bill for business, which the parties agreed to settle); and he declared his opinion

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\* Vide the following cases: *Key v. Bradshaw*, 2 Vern. 102. *Lambe v. Hannan*, 2 Vern. 499.—*Hall v. Potter*, Show. P. C. 76.—*Law v. Law*, 3 P. W. 391.—*Blanchet v. Foster*, 2 Ves. 264.—*Wehber v. Farmer*, 2 Bro. P. C. 88.—*Morrison v. Arbuthnot*, H. L. 1728, which was as follows: On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morrison*, it was agreed that *Morrison* should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord *Arbuthnot* and his friends in consideration of that fortune. The night before the execution of the articles *Morrison* prevailed on Lord *Arbuthnot* privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that *Morrison* had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord *Arbuthnot* bound himself to release *Morrison* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age he brought his action to have this obligation reduced, on two grounds, 1st. That it was granted by him whilst a minor, without the consent of his guardians. 2d. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree *Morrison* appealed to the House of Lords, where the decree was affirmed, with £80 costs.

(a) *Montefiori v. Montefiori*, 1 Bl. Rep. 363.

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(a) For other cases of relief upon fraud on the marriage contract, vide *Thompson v. Harrison*, 1 Cox, 344. *Scott v. Scott*, ibid. 366. *Palmer v. Neave*, 11 Ves. 165. And in these cases, relief is given at the suit of the husband, although a party to such fraud: not merely upon the principle on which relief is given to a *particeps criminis*, on grounds of public policy, but because it is impossible to make him liable in respect of the fraud, without involving the wife and children, and the family, upon whom the deceit has been practised.

Upon the same principle, the Court has relieved, where a creditor, upon a deed of composition, was prevailed upon by the debtor to represent his debt to be below the real amount, receiving notes for the dividends upon the remainder. *Eastabrook v. Scott*, 3 Ves. 456. So where the object of

an agreement was to prevent an opposition to a bill in Parliament, and was to be concealed from the legislature, such underhand agreement was considered a fraud upon the legislature, and as falling within the principles of the above cases. *Vauxhall Bridge Company v. Earl Spencer*, 2 Madd. Rep. 356.

Upon the principle upon which Lord *Thurlow* held Mr. *Wilkinson* bound by his representations, it has also been frequently held, that where a party makes a misrepresentation to one who is entering into a contract, the mouth of the person who makes that misrepresentation, is closed as against those who have been misled by his assertions. *Montefiori v. Montefiori*, 1 Bl. Rep. 363. *Scott v. Scott*, cit. sup. *Dalbiac v. Dalbiac*, 16 Ves. 125. *Ex parte Carr*, 3 Ves. & Bea. 111.

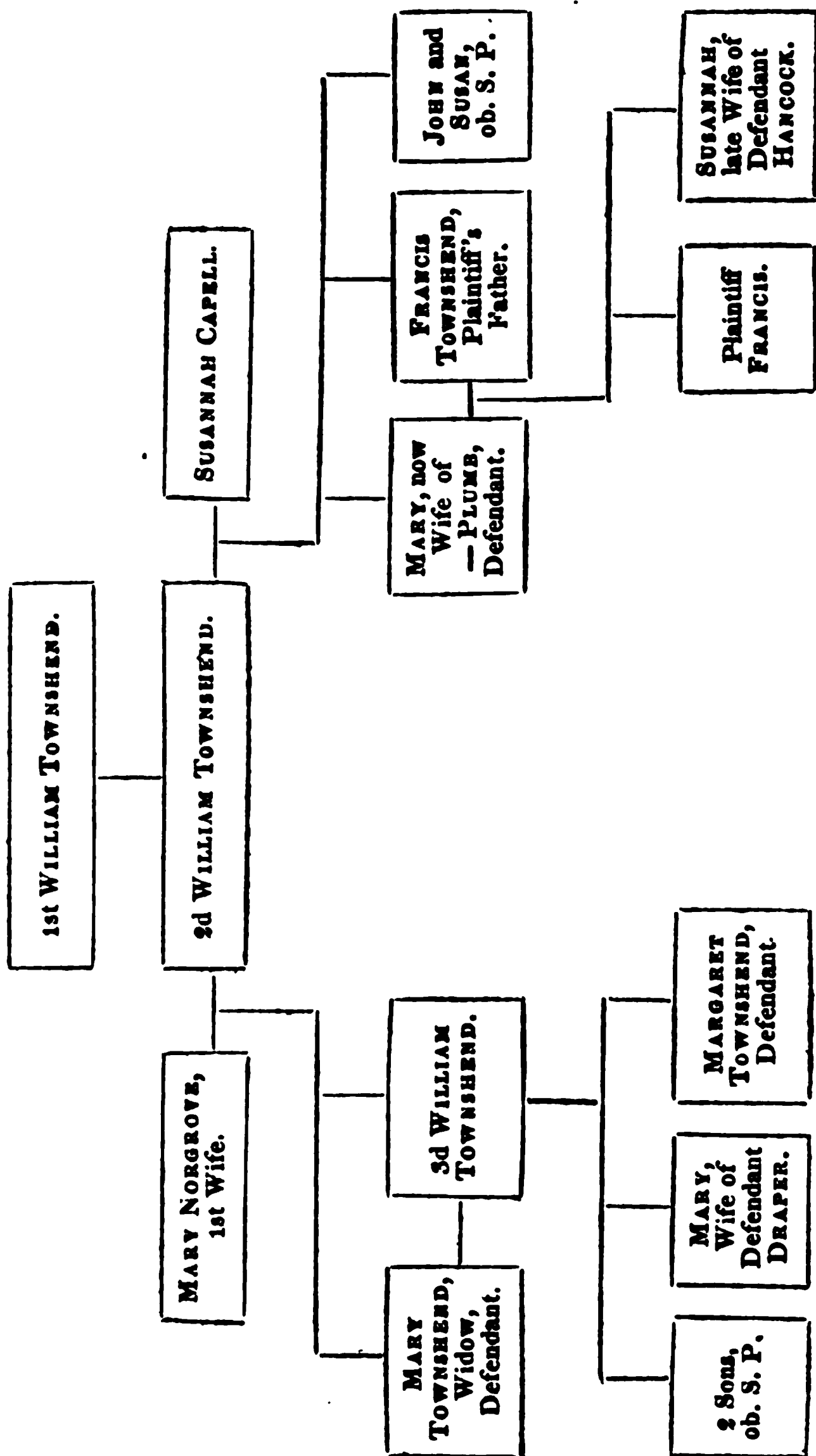
## TOWNSHEND v. TOWNSHEND.

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S. C.  
1 Cox, 28.

FRANCIS TOWNSHEND, - - - Plaintiff.

MARY TOWNSHEND, Widow,—DRAPER and MARY his Wife,  
 and MARGARET TOWNSHEND,—PLUMB and MARY his  
 Wife, RICHARD HANCOCK, Administrator of SUSANNAH,  
 his late Wife, THOMAS NOTT, personal Representative of  
 RANDOLPH STEVENS, (Assignee), - Defendants.



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May 26th, 1783.  
Lords Commissioners *Ashhurst*  
and *Hotham*.

A mortgage term being made the subject of a settlement after marriage with a second wife, but recited to be in pursuance of articles previous to the marriage, (the settlor having children by the deceased wife) under the uses of which the plaintiff claimed, was afterwards conveyed by the settlor and his wife (by fine and settlement) to uses, for the benefit of the children by the first marriage, who and their representatives have been in possession 30 years: plaintiff's bill dismissed, as the Court will presume that the former settlement was known to be voluntary; or the children by the second wife to have had a compensation for their claims. The rule that a trust is not within the statute of limitations applies only between trustee and *cestui que trust*, not against [552] a trust by implication as affected by an equity.

**T**HE first *William Townshend*, being seised in fee of the lands in question, upon the marriage of the second *William Townshend* (his son) with *Martha Norgrove* his first wife, by indenture dated 27th June, 1701, between the 1st *William Townshend*, and the 2d *William Townshend*, conveyed the land to *Nehemiah Norgrove* and another trustee, to hold the lands to them and their heirs, to the use of the 1st *William Townshend*, his executors, administrators, and assigns, for and during the term of 500 years, subject to the proviso thereafter contained, with remainder to the use of 2d *William Townshend* for life, remainder to the use of the heirs of the body of the said *Martha Norgrove*, by said 2d *William Townshend*, remainder to the use of the heirs and assigns of said 2d *William Townshend* for ever, with a proviso, that if the said 2d *William Townshend*, or the heirs of the body of *Martha* by the said 2d *William Townshend* should pay to said 1st *William Townshend* or his assigns, the sum of £50 yearly during his life, and £500 to the executors, administrators, or assigns of said 1st *William Townshend*, then the said term of 500 years to be void.

First *William Townshend* died, and by his will gave the £500 to his daughter: and the said 2d *William Townshend*, having paid off the arrears of the said annuity and the said sum of £500 to the executrix, the executrix by indenture of the 29th January, 1708, assigned the term of 500 years to *Ann Ashworth*, in trust for the said 2d *William Townshend*, his executors, administrators, and assigns.

Second *William Townshend* (after death of his 1st wife, *Martha Norgrove*) married *Susannah Capell*, a daughter of *Ann Ashworth*, and by indenture made after marriage, bearing date 31st January, 1708, between 2d *William Townshend* and the said *Ann Ashworth* of the first part, and *William Rowland* and *Nathaniel Rowe*, of the second part, whereby, in consideration of marriage, and of a competent marriage portion paid by said *Ann Ashworth* to said 2d *William Townshend*, and in pursuance of an agreement made before such marriage, and for settling the residue of said term of 500 years for the uses thereafter mentioned, the said 2d *William Townshend* and *Ann Ashworth* (by his direction) assigned to said *William Rowland* and *Nathaniel Rowe* the residue of the said term of 500 years, in trust for said 2d *William Townshend* for life, remainder for *Susannah* his wife for life, remainder in trust for such child or children of them as the said 2d *William Townshend* should by will appoint, and in default of appointment, for the 1st son of the said 2d *William Townshend* on the body of his said wife and the heirs of his body; remainder to 2d, 3d, and other sons: remainder over. The 2d *William Townshend* had issue by *Susannah Capell*, *Francis* (plaintiff's father) who died in the lifetime of said 2d *William Townshend*, and left plaintiff his only son.

The

The said 2d *William Townshend* had issue by *Martha Norgrove* his 1st wife, 3d *William Townshend*, who married *Mary* the defendant, and by indenture of lease and release dated 26th and 27th of *November*, 1739, between 2d *William Townshend* and *Susannah* his then wife of the first part; 3d *William Townshend* of the second part; and *Greenbank* a trustee, of the third part; and by a fine with proclamations levied by 2d *William Townshend* and *Susannah* his wife, and 3d *William Townshend*, the said 2d *William Townshend* and *Susannah* his wife, in consideration of £400 to the said 2d *William Townshend*, paid by the said 3d *William Townshend*, conveyed the said lands to *Greenbank*, his heirs and assigns, to the use of the said 3d *William Townshend*, his heirs and assigns for ever, with covenants in the release by 2d *William Townshend*, that the said premises were and should be free from incumbrances by him; and by deed poll, dated the 23d of *November*, 1739, and endorsed upon the said indenture of 31st of *January*, 1708, reciting in part the said indenture of lease and release and fine, and that the uses of the said indenture of the 31st of *January*, 1708, were thereby defeated, and that *Nathaniel Rowe* was dead; the said *William Rowland*, by the direction of the said 2d *William Townshend* and 3d *William Townshend*, assigned to *Randolph Stevens* the said premises for the residue of the said term of 500 years in trust, to protect the uses limited of the said premises by the said indentures of lease and release.

The 3d *William Townshend* died in 1755, having by his will, dated in 1751, devised the said premises to the said defendant *Mary Townshend* his wife, for life, without any remainder over. He left *Mary Draper* and *Margaret Townshend* his daughters and co-heirs, and the mother and two daughters afterwards joined in suffering a recovery of the premises, and had them settled to the use of them other for life, with remainder as to one moiety to one daughter, and the other moiety to the other daughter; and the mother had been in possession ever since.

The plaintiff went abroad immediately on his coming of age, and did not return till the year 1775; he claimed by his bill to be entitled to the benefit of the term, under the indenture of 1708, and prayed that all deeds might be delivered unto him, and that *Randolph Stevens* might assign the residue of the term to him, and that he might be let into possession, and for an account of rents and profits.

It was contended by Mr. *Mausfield*, for the plaintiff—that the whole interest in the term vested, under the indenture of 1708, in plaintiff's father as tenant in tail of personal property; and that the indentures of 1739 were therefore void. Two objections were made to the plaintiff's claim. First, that the indenture of 1708 was made after marriage, and was therefore voluntary. 2dly, that the

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the plaintiff was barred by length of time. As to the first objection, the indenture of 1708 recites, that it was in pursuance of articles entered into before marriage. At this length of time the Court will not presume it otherwise. As to the second objection, the whole transaction was a fraud: and therefore the statute of limitations is out of the question. The trustees conveyed the term by the deed poll of 1739, as a satisfied term. It is impossible to contend that the parties did not know it to be unsatisfied. Plaintiff's father was an infant, and therefore could not be satisfied as to his interest. A trust is not within the statute of limitations; but the trustees under the indentures of 1739, having notice ought to be considered as trustees for the plaintiff.

Mr. *Kenyon*, for the defendants.—It is rather a difficult presumption that the second wife joined in disinheriting her own issue in favour of the children of the first. The term was, in its creation, in effect a mortgage, and the question is, whether the mortgage is still a subsisting charge.—The indenture of 1708 was voluntary, being after marriage: the recital is not even that the articles were in writing; but if they were so, it is no evidence to affect my client.

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Then as to the statute of limitations: in 1749 the title accrued to a person capable of making his claim: he does make it in 1779. The Court will always presume a mortgage satisfied at that distance of time. It would be clear in a court of law, and when once the statute of limitations begins to run no disability of the party shall stop it. It is the common practice, that if the mortgagee gets into possession, and continues in it twenty years, the mortgagor is barred of his redemption; not because the statute has said so, but because it is a convenient and wholesome policy. So in this case, either ground of its being a voluntary settlement, or the length of time is sufficient.

Mr. *Hollist*, on the same side.—The rule that a trust is not within the statute of limitations does not hold in this case. That rule is only between the trustee and his *cestui que* trust. *Llewellyn v. Mackworth*, Barnard, 445.

Mr. *Mansfield*, in reply.—As to the objection of its being a voluntary settlement, recitals in old deeds are always evidence, for the articles are usually destroyed on the execution of the settlement; but if the agreement was by parol it is good to make a settlement. It cannot indeed be enforced against an unwilling party—but, if it be admitted, it is a good consideration for the settlement. As to the statute of limitations, both in the light of a fraud and a trust, it does not affect this case.

Lord



Lord Commissioner *Ashhurst*.—The first point is that the defendants are purchasers for a valuable consideration, and the settlement of 1708, is voluntary. If this had been all, we should have thought with the plaintiff; but as to the case of the defendants, they claim under the deed of 1739, and have been in possession ever since. It is said by the plaintiff, that the defendants took the term as a trust, with notice; but it is unnatural to infer a fraud in this case, for the mother must be presumed to defeat the provision for her own children. In this view, one would rather infer that the parties knew that the settlement was voluntary, or that some compensation was made to the children of the second marriage. Then as to trusts being an exception to the statute of limitations: the only rule holds as between trustees and *cestui que* trusts. It is true that a trustee cannot set it up against his *cestui que* trust: but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both courts of law and equity preserve an analogy to the statute of limitations (a).

The case of mortgagor and mortgagee is a stronger case than this: *Aggas v. Pickerell*, 3 Atk. 225; and therefore so doubtful an equity as this must certainly be within the rule. We therefore dismiss the bill, but without costs.

(a) The distinction of Lord Commissioner *Ashhurst* between actual trusts and trusts by implication, was recognized and approved by Sir *W. Grant*, in his very luminous judgment in *Beck-*

*ford v. Wade*, 17 Ves. 99. See more as to the analogy preserved by Courts of Equity to the statute of limitations, *Andrew v. Wrigley*, post, vol. iv. 124, and the Editor's note.

### HOLMES v. HOLMES.

**H**OLMES, the father, who was a jeweller, by his will, dated in November 1771, gave his son £500, and £2,000 to four unmarried daughters; then gave his son the utensils of his trade (which were of trifling value) and gave the residue of his personal estate to his wife for life, and after her death he gave further legacies to his daughters: to some £500, and to others £1,000, and if any surplus, to be divided amongst all his children who should be then living (there being then seven in all). In 1779 he took his son into partnership with him, and by the deed of partnership the stock was to be £3,000, to be brought in equally, and they were to be equally entitled to the profits. The father brought in the whole capital, and it was understood by the whole family that he meant to give the son the half of the stock. The children who were of age, by their answer admitted this; and there was parol evidence of de-

clarations

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Lincoln's-Inn  
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1783.

Father, by will, gives his son £500, he afterwards takes him into partnership. The stock being £3,000, this is not a satisfaction of the legacy.

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clarations of the testator, at different times, that he meant to bring his son into partnership and to give him half the stock, and even the whole, and that he told one witness that he had brought his son in, and had given him £1,500. The question made in the cause was, whether this advancement was a satisfaction of the legacy of £500, and it was held not to be a satisfaction, not being *ejusdem generis*; and that it must have been the testator's intention that the plaintiff should have both. Lord Commissioner *Hotham* relied on an argument for the plaintiff, that if the legacy had been a moiety of the stock, and afterwards £500 had been given, it could not have been a satisfaction (a).

(a) See the case of *Grave v. Earl of Salisbury*, ante, 425, and the Editor's note to it.

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Lincoln's-Inn  
Hall, Oct. 29th,  
1783.

Petition that a guardian may be assigned (unless to carry on a suit, or protect an interest) must be pursuant to the statute.

*Ex parte* BECHER.

**T**HIS was the petition of *Charlotte Becher*, of the age of seventeen years, to have a guardian of her person assigned by the Court:—but it was not a petition under the statute.

It appeared that the father had died in the *East Indies*, insolvent; that her mother was alive and resided there: that no guardian had ever been appointed; that she had no estate either real or personal; and that a very advantageous offer of marriage had been made to her, to consent to which was the object of praying for the appointment of a guardian (she lived with her uncle, by the mother's side, who was also the father's executor). But the Court said, that this not being a petition according to the statute, and not for the purpose of carrying on any suit or protecting any interest, there was no object which the Court could take notice of to entitle the petitioner to what she prayed.

They therefore dismissed the present petition; but directed a new petition to be presented pursuant to the statute, which being done at the rising of the Court, an order was made accordingly.

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## VAUGHAN v. THOMAS.

Lincoln's-Inn  
Hall, Oct. 31st,  
1783.

Taking an annuity worth nine years purchase at five years is an unconscientious bargain, and the Court will give the taker no assistance in a bargain for a re-purchase.

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**T**HE defendant, General *Thomas*, being in great want of money, came to an agreement with the plaintiff, who was a broker, for the sale of an annuity of £300 for his (the defendant's) life for the sum of £1,500. The defendant then represented himself to the plaintiff to be of the age of fifty-five years; and the plaintiff accordingly ensured the defendant's life as being of that age. The original transaction was on the 1st of *December*, 1775. In *March* 1777, it was discovered that the defendant was of the age of sixty-one years at the time of granting the annuity; but, as the defendant swore by his answer, he did not himself know it at the time. In consequence of this discovery the plaintiff was forced to pay an additional premium of £7. 2s. 6d. for the ensurance of the defendant's life. On the plaintiff's representing this mistake of the age to the defendant, it was agreed that the plaintiff should grant to the defendant an additional annuity of £50 as commencing from the 1st of *December*, 1775; which was accordingly done by endorsement on the original grant. In that endorsement the additional annuity was mentioned to be granted for the consideration of £250, but in fact no money was paid on that occasion. In *December* 1779, the defendant applied to the plaintiff to re-purchase the annuity, and thereupon an agreement was drawn up in writing, and signed by the plaintiff and defendant, whereby the plaintiff agreed to give up the annuity on payment of £1,500, the original purchase-money, and all arrears then due, deducting thereout the sum of £200, which was understood to be the four years of the additional annuity of £50; the arrears then due amounted to £475, so that the principal sum then settled for the re-purchase was £1,775. After this agreement had been signed the plaintiff said it was unintelligible, and struck out his name; two days afterwards they met again, and the plaintiff's attorney prepared an agreement, whereby the plaintiff relinquished the annuity and all arrears then due for the sum of £2,000 to be paid by instalments, but to carry interest in the mean time. This agreement being signed, the plaintiff brought this bill for the performance of it. It was referred by the *Master of the Rolls*, to inquire into the circumstances, and to find the value of the original and additional annuity, and the defendant's age.

It now came on upon the Master's report; he reported the annuity worth nine years purchase, when it was first granted. The plaintiff insisted that the whole transaction was fair, and that he was entitled to the assistance of this Court to carry it into execution.

But

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But the Court said, that if they assisted the plaintiff they should give a sanction to a very unconscientious bargain; and that under this view of the case, the plaintiff was by no means entitled to the aid of this Court.

*Bill dismissed (a).*

(a) Vide *Heathcote v. Paignon*, post, vol. ii. p. 167. and the Editor's note to it.

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Lincoln's-Inn  
Hall, 5th and  
other days in  
July, 1778, be-  
fore Lord Thar-  
low: 12th No-  
vember, 1783, be-  
fore the Lords  
Commissioners.  
Leases for lives,  
obtained by  
agents of a de-  
ceased person of  
weak intellects,  
upon inadequate  
considerations  
set aside as frau-  
dulent.

## GARTSIDE v. ISHERWOOD and others.

THE bill was filed by the plaintiff, as heir at law of *John Moss*, Esq. against the defendants, to set aside a variety of leases granted by the deceased to the defendants, as obtained by fraud and imposition.

It stated that, by indentures of 28th and 29th December, 1764, being the settlement previous to the marriage of *John Moss* with *Apollonia Bayley*, the manor of *Little Bolton*, in the county of *Lancaster*, was settled upon the husband for life, without impeachment of waste, remainder to trustees for ninety-nine years, to empower the wife to receive £300 *per ann.* by way of jointure, remainder to such uses as *Moss* should appoint, remainder to *Moss*, in fee. That *Moss* died the 14th of December, 1679, aged about thirty-six years, leaving *Apollonia* his widow surviving him. That *Moss* being of weak understanding, employed the defendants *Isherwood* and *Smedley* as agents or stewards under him, who, by fraud and imposition, obtained leases from him at an under-value, several of these were of lands which had been before demised for terms of years, determinable upon lives, and which by lapse of time or otherwise had become less valuable, and now were granted for longer terms upon a greater number of lives, and were granted either to *Isherwood* alone, *Smedley* alone, or *Smedley* and *Isherwood* jointly, on higher terms during the life of *Moss*, (though below their real value,) then to sink to low rents: In particular; that *Isherwood*, being possessed of two leases, dated respectively the 31st of January, 1752, and 31st December, 1752, surrendered them, and obtained a lease dated the 20th of August, 1767, of the same, with additional premises for seven lives, and thirty-one years after the determination of the last life, at the rent of £31. 10s. *per ann.* and upon the 28th of March, 1769, on surrender of that lease, obtained a new one of the same, with additional premises for nine hundred and ninety-nine years, at £50 *per ann.* during *Moss's* life, to drop to £10. 10s. after his decease; it was in evidence, for the plaintiff, that these premises were worth £80 *per ann.*: that *Isherwood* and *Smedley* had a joint lease of premises in *Upper Bolton* for nine hundred ninety-nine years, at £67 *per ann.*; it was in

in evidence that those premises were worth £80 *per ann.* That *Smedley*, being in possession of several leases for lives, on the surrender of them the 8th of *August*, 1767, obtained a new lease of the same with additional premises, for twelve lives and twenty-one years, at £58 *per ann.* rent, and on the 27th of *November*, 1767, on surrender of that lease, obtained a lease for the same lives and thirty-one years, at £78 rent, during *Moss's* life, to fall to £80; the value at this time was in evidence to be £63, and the 31st *December*, 1768, upon the surrender of that lease, he obtained a new lease of the same, with additional premises, for nine hundred and ninety-nine years, at £80. 7s. 6d. *per ann.* rent during *Moss's* life, and then to fall to £8 *per ann.*: it was in evidence, that the value of these premises, at the time of granting the last lease, was £94 *per ann.*: That upon the 18th of *June*, 1768, he obtained a lease of three water corn mills and a colliery for nine hundred and ninety-nine years, at £84 *per ann.* during *Moss's* life, to drop to £37 *per ann.*; the value of these premises was in proof to be £57 a year: That on the 20th *June*, 1769, he obtained a lease for nine hundred and ninety-nine years in a tenement called *Broughton's Tenement*, at £10 *per ann.* after the death of *Broughton*, during *Moss's* life, to drop at his decease to £5 *per ann.*; it was proved that the premises were of the value of £11 *per ann.*

The cause was heard on several days in *July* 1778, when a great quantity of evidence was read.

Mr. *Attorney-General*, Mr. *Mansfield*, and Mr. *Kenyon*, for the plaintiff, insisted that these leases were evidently fraudulent, merely from the inequality of the consideration upon which they were granted; that the real value of the estates was much beyond the utmost reserved rent upon each lease: that *Smedley* and *Isherwood* were stewards or agents of Mr. *Moss*, and that Mr. *Moss* was a weak man, easy to be imposed upon; that it was the duty of the stewards to turn their sagacity to the advantage of their employers, and not to their own advantage in opposition to his; and that upon these grounds the plaintiff was clearly entitled to the relief sought by his bill.

Mr. *Price*, Mr. *Madocks*, Mr. *Bolton*, and Mr. *Parker*, for the defendants, contended that the bargains were neither unfair nor unequal; and to prove the last they produced a variety of calculations, they also contended that *Moss* was not a weak man, that *Smedley* and *Isherwood* were not his agents; that he disliked the *Gartside* family, and wished to increase his income by granting such leases: that the matter was public, and similar leases were granted to others; they besides objected to the length of time before the bill was brought; Mr. *Moss* having died in 1769, and the bill not having been filed till 1776. This delay the plaintiff excused by throwing

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throwing it upon his attorney; by shewing that upon the death of *Moss*, he had given immediate notice to the defendants of his intention to impeach the leases, and that he had actually brought an ejectment and recovered under an old term; but had been restrained, by injunction, upon a bill filed by the defendants. After the arguments, the 25th of *July*, 1778,

*Lord Chancellor* broke the case as follows:—If the real value of the estates, at the time the bargains were made, the number of years purchase at which lands then usually sold in that part of the country, and the value of the incumbrances affecting the estates at the times the bargains were made had been accurately stated, it would have been easy to have decided whether the interest obtained by the defendants, subject to those incumbrances, has been sufficiently paid for; but it is not tolerably manifested what was the value of the lands at the time when the several leases were made, or what was the number of years purchase for which estates then usually sold in that country, or what was the value of the incumbrances affecting the estates. It is, therefore, impossible to state with any accuracy the disproportion between the real value of the purchase and of the thing given for the purchase. Upon the whole, however, there appears strong ground to presume fraud. The jurisdiction of the Court in cases of this nature, cannot be so defined as to stand on very accurate principles. The case of *Filmer v. Gott*, 7 Bro. P. C. 70, mentioned by Mr. *Attorney-General*, is a very strong one, and has been approved by a decision of the House of Lords. The only principle upon which that case could be supported was, that if a confidence is reposed, and that confidence is abused, a court of equity shall give relief. It used to be held that a contract ought not to be set aside merely for inequality in the bargain, or merely upon the ground of the weakness of the person from whom the contract has been obtained, 3 P. W. 130. But the Court has since gone farther; the only principle which I can at all fix is, that wherever it appears that fraud has been practised, there the contract, however valid at law, shall not stand in this Court. Fraud may be collected from circumstances; one circumstance from which fraud may be collected is gross inequality; this may be attended with the additional circumstance that one of the parties confided in the other, or was pressed by necessities, which disposed him to give way to the other; but in all the cases the basis must be gross inequality in the contract, otherwise the party selling cannot be said to have been in the power of the party buying; unless actual imposition is proved by gross inequality other circumstances of fraud will pass for nothing; the basis must be gross inequality: And the turn of the scale must be considerable against the person who has the legal estate. There is no method of marking any line but by making it necessary to prove gross inequality. There is an objection to the relief sought by this bill, arising from



from the delay in seeking the relief; this is no objection for the time whilst *Moss* lived, but he died in 1769, from 1769 to 1776 the plaintiff was dormant; he brought an ejectment, and the present defendants filed a bill for an injunction, the injunction guarded the possession, and the defendant in that suit put in no answer till after the present bill was filed; if an answer had been put in, shewing this strong case of fraud, the injunction I apprehend must have been dissolved, though the ejectment was brought upon a satisfied term. From that time the estates have been publicly letting, part upon building leases. It is necessary to consider the time the plaintiff has laid by as an objection to his claim; but if he shews strong evidence of fraud, it will be hard to say that this length of time shall be sufficient to bar him of his remedy. As to the other grounds upon which this transaction is endeavoured to be impeached, it is clear *Moss* was a weak man from the evidence on both sides. It is equally clear that his weakness was not such as to be a ground for a commission of lunacy, or to impeach his acts at law; the witnesses for the plaintiff state him to have been stupid and foolish to the highest degree. The instances produced, though in themselves ridiculous, yet being produced by fair people as satisfying their minds, are sufficient to convince me of his weakness; one of the witnesses says he was not so bad as he was generally thought to be, that he could write letters and transact ordinary business: this shews he was generally considered as a weak man. On the other side it is attempted to prove that he was a man of strong understanding, attentive to his affairs; the instances are absurd: there can be no doubt that his understanding was below that of the generality of men. As to his health it is impossible to say, the habit of his health gave many symptoms of a quick decay: but there is full evidence that he was not thought in a good state of health. The contract is not to be considered as made in expectation of sudden death, but in expectation of a good bargain from indifferent health. As to the relation in which the parties stood, it is evident *Isherwood* had a yearly salary; a lease of lands worth £11 a year was granted to him at 6s. a year, and this he himself defends as granted to him for services done: That *Smedley* was a person confided in by *Moss* is clearly proved by all the defendant's witnesses, as far as confidence went; therefore both the defendants stood bound to behave fairly and clearly towards him: and it seems to have been the policy of the law not to permit any persons, so circumstanced, to take any such advantage. The defendants assert that *Moss* was not imposed upon, but acted from the mere impulse of his own mind; they suppose him to have had an aversion to his heir, an heir, whom he might, if he pleased, have disinherited. Consider the state of body and mind of a man, who in 1767, aged about thirty, and married only in 1764, to a young wife, despaired of having issue, and therefore desired to deprive his heir of an estate of which he was seised in fee. Upon the material subject, the

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the value, the terms seem such as will hold equally to the principle, but the facts are not sufficiently stated for me clearly to make a decision. I propose therefore to send it to the Master, to inquire into the value of the lands, and the consideration given by the defendants. Upon reference, the Master will distinguish the improved value which has arisen from money expended from that which has arisen from the improvable nature of the lands: for it is monstrous to suppose, as has been contended for by the defendants, that the improvable nature of the estate is not to be considered as an advantage, for which a price should have been paid. Though it is clear that *Moss* was imposed upon, I wish to have it appear how much he was imposed upon.—It is alledged, that leases for three lives are common in that country, but there is no proof that leases for nine hundred and ninety-nine years are common, or that it is common to let a whole manor in such a way, with power to dig coal and every sort of mineral except lead; I have no hesitation to pronounce, that the case is carried as far as preparation can go before actual information is obtained. The relation between the parties is proved; the defendants were clearly persons intrusted: the weakness of *Moss* is evident; his state of health was clearly such that his life was not to be estimated at the ordinary value of a life of 34.—There is also a strong ground from the evidence to believe that there was gross inequality in the bargain; but I send it to the Master because the evidence has not shewn a distinct disproportion.

The counsel for the defendants objecting to the delay and expence, which, they alledged, would attend the going before a Master, desired that an issue might be directed, and proposed an issue to try whether the contracts were entered into upon fair and valuable considerations.

The *Chancellor* said that, if a jury found the contracts were entered into upon fair and valuable considerations, he certainly should not attempt to set them aside. But this issue appearing to be inconclusive, if found for the plaintiff, he ordered the cause to stand over till the 28th.

On the 28th *July*, *Lord Chancellor* said, in this case, every circumstance which, combined with a gross inadequacy of consideration, induces a court of equity to set aside deeds as fraudulently obtained is clearly made out; but whether the considerations on which the leases were granted were adequate or not does not fully appear; on one side it is insisted that they are grossly inadequate, and strong evidence of this is given; on the other side, the contrary is asserted: and they have offered an issue upon that fact. If the consideration was perfectly adequate there would be no possibility of setting aside the contract; there are cases indeed, in which

which the example and concern for the public have been considered as having weight; the abuse of confidence is also a circumstance; but the only evidence that this confidence has been abused, is a gross inequality in the contract, I therefore proposed to refer it to the Master to look into the instruments, and to inquire into the considerations, whether adequate or inadequate, and how far inadequate; but the defendants have offered an issue: In this they have gone beyond my idea, for if the consideration was not perfectly adequate, yet if it was not very inadequate, I saw no grounds to set aside the contract; the consideration being simply inadequate is not alone sufficient; combined with many of the circumstances of this case it would not be sufficient; the degree of inadequacy necessary to invalidate a contract will be very different according to the circumstances of each particular case. The agreement for the coals has many additional circumstances, which the other contracts have not: It gives an interest which over-rides the whole manor; there is a power to get every sort of mineral, *except lead*, without restriction; the lessor is perpetually bound to keep the watercourses in repair; if the coal mines are unproductive the lessor gets nothing, if they are worked to the greatest advantage the rent can never exceed £25, if they produce less, the rent is to be proportionally less. But the circumstances of the contracts, the character of the man, the situation in which the parties stood, are matters merely for the decision of a court of equity. Where a matter of law arises, there it is proper for me to send the parties to the courts of law; where a matter of fact is necessary to be considered, and there is no doubt upon the evidence of the fact, there it is proper to send a neat matter of fact to the decision of a jury. It will therefore be improper to direct the issues in the manner mentioned by the defendants, whether the contracts were entered into upon fair and valuable considerations, for this will leave all the circumstances of the case to be decided upon by the jury, and will put it upon them to exercise the peculiar jurisdiction of a court of equity; the issues must therefore be, whether the considerations of the several deeds were fully inadequate to the interests gained by those deeds (*a*). The inadequacy of the consideration must be the basis upon which the Court is to grant the relief prayed by the bill: the thing to be inferred, from the inadequacy of the considerations, is fraud: inadequacy is evidence of fraud: for that purpose it must be gross; but in some circumstances it must be greater than in others, and how far the considerations must be in-

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(a) As to the nature of issues directed by a Court of Equity, the object of which is to inform the conscience of the Court, vide *Richards v. Symes*, 2 Atk. 319. *Baker v. Hart*, 1 Ves. 28. 3 Atk. 542. *Stace v. Mabbot*, 2 Ves. 552. *Earl of Darlington v. Bowes*, 1

Eden, 270. *Pike v. Hoare*, 2 Eden, 187. *Standen v. Standen*, 1 Ves. jun. 154. *O'Connor v. Cook*, 8 Ves. 535. *The Warden & Minor Canons of St. Paul's v. Morris*, 9 Ves. 155. *Pemberton v. Pemberton*, 11 Ves. 50. *Hampson v. Hampson*, 3 Ves. & Bea. 41.

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adequate, to entitle the plaintiff to relief, must be for the consideration of this Court: I therefore thought it more advisable to refer the matter to the Master: but as the defendants have prayed an issue, and have boldly offered to abide the event, I cannot refuse to grant it, and they must take it in the manner I have mentioned (a).

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An order was accordingly made that the parties should proceed to trial at the next *Lent* assizes for *Lancashire*, upon five issues, whether the considerations given for the leases mentioned in each issue were adequate to the interests acquired, and in these issues the defendants here were respectively to be plaintiffs and the plaintiffs here defendants.

These issues produced three records for trial at the assizes; in the first *Smedley* was plaintiff, for trial of three issues directed between the plaintiff and him, on the value of his three leases; in the second, *Isherwood* and *Smedley* were joint plaintiffs, on the joint lease; and in the third, *Isherwood* was plaintiff. In the first and second of these the jury gave verdicts for the defendant at law against the validity of the leases; and the third record was withdrawn.

The cause came on again the 29th *August*, 1779, when, upon affidavit of the three records being made up, and the last being withdrawn, judgment was ordered to be taken *pro confesso* against the plaintiff at law on that issue.—Motions were afterwards made for new trials, but refused, on account of the length of time that had passed before the application.

There were afterwards several proceedings had in the cause, in consequence of the deaths of parties; and it came on, upon the equity reserved, before the Lords Commissioners, 12th *November*, 1783, when the Court ordered the leases against which the jury had found verdicts, and comprised in the record upon which judgment had been taken *pro confesso*, to be set aside, as obtained by fraud; and the leases surrendered at the time of taking the same, and other unimpeached leases to be restored to the defendants (b).

(a) This case was cited for the defendants in the arguments in *Huguenin v. Baseley*, 14 Ves. 283, to shew that a mere agent employed to receive rents, is not a person, who, on the grounds of public policy, is disabled from receiving a benefit, &c. the leases having been here set aside on the express ground of fraud. As to the persons who are prevented from accepting benefits, or precluded by their situation, with respect to others, from purchasing

from them, vide *Newman v. Payne*, post, vol. iii. 350. *Fox v. Mackreth*, post, vol. ii. 400.

(b) There is an account of what passed on the cause coming on before the Lords Commissioners, 2 Dick. 612, where the Reporter gives a very elaborate account of the distinction between a bill of review, and a supplemental bill in the nature of a bill of review.

Bishop

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## (f) Bishop of PETERBOROUGH v. MORTLOCK.

**D**R. Goddard, Master of *Clare-Hall, Cambridge*, by his will, gave several pecuniary legacies, and then “to *A.* £100, to *B.* £100, &c. &c.; to *Storey’s Hospital* £3,400 in the 3 per cents. the annual dividends of which to be every half year divided betwixt four widows.”

It appeared that, at the time of making his will, and at the time of his death, he had only £2,200 standing in his name in the 3 per cent. annuities, of which £150 belonged to other persons, as he had declared by a writing in his own hand; but the remaining £2,050 belonged to him in his own right. There being a deficiency of assets, the question was whether this legacy of £3,400 in the 3 per cents. was to be considered as a specific legacy, or as a pecuniary legacy, and consequently to abate.

Lincoln’s-Inn  
Hall, Feb. 20th,  
1784.

Bequest to an  
hospital of  
£3,400 in the  
3 per cents. the  
dividends to be  
divided among  
four widows, this  
is a pecuniary not  
a specific legacy.

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Mr. Mansfield and Mr. *Graham* for the plaintiff:

Mr. Attorney-General and Mr. *Le Blanc* for the defendant.

The cases cited were,

*Aston v. Aston*, For. 152.—*Purse v. Snaplin*, 1 Atk. 414.—*Sleece v. Thorington*, 2 Ves. 560.—*Avelyn v. Ward*, 1 Ves. 425.

*Lord Chancellor*.—In this case I confess it does not appear to me that there is any question of difficulty.—On the face of the will, it is clearly a pecuniary legacy;—and if it is to be turned into a specific legacy it must be upon other circumstances.—The form of the bequest is to give £3,400 in the 3 per cents.—The testator has been definite in applying the quota of maintenance to each widow.—On the face therefore of the will it is purely pecuniary, and extends only to a direction to buy such a sum in such a stock.—But it is said, that although this may be so in the words, yet that circumstances may be given in evidence as to the state of the funds in his possession at the time of making the will.—If he had at the time of making his will more stock than that which he devised, it is said it will be a specific legacy; but that this is not the only case in which the Court has been used to make this inference.—When I say this, I do not mean to be understood that the Court has laid it down as a positive rule of law, but merely as an interpretation of evidence. In the case of *Ashton v. Ashton*, the argument did not turn upon its being a specific legacy or not, (which

(f) *Bronsdon v. Winter*, Ambl. 67.

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seems

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seems taken for granted) but merely upon the consequences of its being specific; if that case had applied more to the present I should have thought it necessary to have looked more into it.—In all cases where the legacy is considered as specific, the Court takes for granted that the testator meant that particular fund, although he may be mistaken in the description of it; now this intention ought to be made out by strong circumstances, which certainly do not exist in the present case.—I am therefore of opinion that this is a pecuniary legacy; and must consequently abate in proportion with the rest (g) (a).

(g) The decree directed the Master to inquire what was the market price of the 3 per cent. annuities at the date of the decree, and that the value of £3,400, 3 per cent. annuities, at such market price, was to be considered as the amount of the legacy given to *Storey's Hospital* in Cambridge. Vide *Purse v. Snaplin*, 1 Atk. 418.

(a) The cases in which legacies of stock, &c. have been held pecuniary or specific, are collected in *Simmons v. Vallance*, post, vol. iv. 345.

## ADAMS v. WEARE.

*Appeal from the Rolls.*

Easter Term,  
May 3d, 1784.

B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of a corporation is necessary; but A. refuses to treat on condition; B. fails in obtaining consent: This failure in his speculation, is no defence against a bill for specific performance.

**B**ILL, brought by the vendor against the vendee, for a specific performance of an agreement.

The contract was a memorandum, signed only by the defendant, to the following purport: That the vendee agreed to buy of the vendor the premises in question, provided he would convey them to him, and make a good title thereto. The vendor took a guinea of the vendee by way of earnest.

The vendee, by his answer, suggested that he had agreed to buy the premises conditionally only, viz. for the purpose of working a mill which he intended to erect upon the lands, provided he could obtain the consent of the corporation of *Bristol*; and that, in consideration of these circumstances, he agreed to give a very large price, more than 60 years purchase, for the lands; but that, upon application to the corporation, they refused their consent, by which he was prevented from erecting his mill: he therefore refused to perform the contract, insisting that his agreement was conditional, in case he could obtain such consent; and, having failed therein, he was not bound to purchase the lands at such advanced price.

There



There was evidence in the cause of these circumstances, and that the purpose of building the mill, which depended on the consent of the corporation, was in the view of the vendee, but not that it was in the view of the vendor, and so far from having agreed to such condition, the vendor had never mentioned it.

The late *Master of the Rolls* had decreed for the plaintiff.

Upon an appeal :

On the part of the plaintiff, it was argued that there was an express agreement in writing, and as to the hardness of the bargain, there was no fraud or surprise : It was a well considered contract, and however hard the bargain might appear, the party contracting for the purchase did not at the time think so. The Court must consider the thing as done; and supposing the contract to have been executed at the time when the agreement was made the Court would not set it aside. *Mortimer v. Capper*, ante, p. 156. *Cass v. Ruddle*, 2 Vern. 280. where the premises had been destroyed by an earthquake.

For the defendant, it was contended, that the bargain, as circumstances had turned out, was hard and unconscionable; that the proposals and conditions were not adhered to; and that the Court could not carry the agreement into execution; but if the plaintiff was to have any remedy, it was at law upon an action of covenant; that there are instances where the Court, on an agreement executed only on one side, had refused to decree a performance, *Bromley v. Jefferies*, 2 Vern. 415. So in a case where the articles appeared to be unreasonable, *Young v. Clerk*, Pr. Ch. 538. so where the lands turn out to be other than the purchaser supposed them to be, *Hick v. Philipps*, Pr. Ch. 575. Where a bargain is good at the commencement, but turns out a hard one afterwards, the Court will not decree a performance. *Stent v. Bailis*, 2 P. W. 220. as in case of an house which is burnt down before the conveyance, *Pope v. Roots*, 7 Bro. P. C. 184. and a case mentioned by Sir *Joseph Jekyl*. So where a bargain has become oppressive, it is in the discretion of the Court to relieve, *Chesterfield v. Janssen*, 1 Atk. 301. *Barnardiston v. Lingood*, 2 Atk. 135. *Buxton v. Cowper*, ib. 383. In this case the purpose has failed, and as the agreement was merely executory, it ought not to be executed.

*Lord Chancellor.*—It is very material, in this case, to attend to facts. I am not very anxious to discuss the point what bargains the Court will execute or not; but when the Court has laid it down as an article of the equity, which men shall obtain here, and which

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which they cannot obtain at law, that instead of damages they shall have a specific performance; and that every agreement must be performed, unless something at the time of making the bargain, or something done since is to amount to a waiver of it at the time of carrying it into execution; if you do not confine yourself within that limit there are no bounds whatsoever: for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable; which expressions, unless they are properly applied, mean little or nothing. This bargain, if impeached, must be so at the time of its commencement: for nothing has happened since to impeach it, unless that the party has failed in his speculation in respect to a bargain which he made with his eyes perfectly open. It is perfectly necessary to see what were the real terms of the bargain. On the 11th of *March*, overtures were made concerning the purchase of these lands by *Weare*. £800 was demanded as the price for the estate, putting that value upon it in contemplation of building the mill, and other articles of no moment now, unless the erection of the mill was the real ground upon which the price was carried to the extent it was. It was insisted, it cannot be carried into execution, because it is proved that the price was more than three-fourths more than the value; but, for what I know to the contrary, it may be the value. After the 11th of *March* no answer was given to that letter; but *Weare*, in order to get a farther treaty, applied to a Mrs. *A.* as a relation of the family, to go with him, and take *Adams* aside, and ask him, in privacy, the lowest price he would take; which she did, and he made the same demand as before: and some days afterwards, *Weare* went again to *Adams* with Mrs. *A.* to treat with him. As to the objection, that this is the evidence of relations; I think it is fair and unimpeachable evidence. They went to *Adams* before dinner, and conversation was had in regard to the improvement by building a mill, which is beyond doubt; and the price was reduced to £740. Mr. *Weare* agreed to give the price, and to build the mill, if he could get the consent of the corporation; and the single suggestion mentioned was the consent of the corporation. Mr. *Adams* said I will have no if; it shall not be conditional: the business shall be all yours to get that consent. *Weare* was an alderman of the corporation, and he had interest; but *Adams* had none. The price was settled upon an express acceptance of the estate; and *Adams* would have nothing to do with any conditional bargain, as to obtaining the consent of the corporation. After dinner the agreement was made out; and it is suggested that it was intended as a *conditional* bargain, though the evidence has proved the contrary, and the agreement is written without expressing any thing upon the application. *Adams* was the person to draw the agreement; and he observed, we must be upon honor, and no advantage to be taken of the condition. It

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is impossible, if that conversation had related to such a condition, he should not mention it in the writing. He knew himself to be incapable of executing any such condition, and therefore the conversation related to the mere form of drawing out the writing.— Thus the matter rested till the 22d of *March*, when *Weare* wrote to *Adams*, to inform him that he had wrote to Mrs. *Day* (tenant to the corporation), to whom the erection of the mill would have been injurious, and as her consent could not be obtained, the bargain was off. It struck me strange that he should confine himself to Mrs. *Day*, and say nothing of the corporation; but the evidence says, that he was informed, by him, that he had made this bargain, and proposed purchasing lands on the other side of the river, with her consent; but that was not made one of the terms, because he thought himself sure of her consent. When I consider the evidence, and upon what consideration this consent was to be had, I am sure he made no doubt of obtaining it; but the surveyor said it would be of prejudice to Mrs. *Day*, when the consent was denied him. The question is, what he has done to obtain the consent of the corporation, could he, or could he not have obtained Mrs. *Day*'s consent if he had offered her a premium for any imaginary damages that would have arisen to her by his building the mill. The burthen lay upon *Weare* to obtain that consent; it was his part to have done so: but there is no evidence of accommodation on his side as to that point, for it only says he applied to Mrs. *Day* and she refused her consent, but nothing is mentioned as to a premium being offered by him. Suppose he had obtained her consent, and the corporation had been mentioned; when it was an express part of the case that the owner should not have been answerable, there appears rather to be fraud on the part of the defendant, for he had no authority to think so. It has been said, stating the answer given to that letter by *Adams*, that there is something in it, because he does not expressly deny that he could not obtain the consent. In reply, he only insists upon the agreement, but does not charge it in the manner it is done on the other side. It does not appear how this consent may be obtained; for if he can obtain it, the agreement may still be executed. It does not appear to me what the value of the premises would be, if applied to the purpose of working the mill. What the advantage of it might be is not stated; therefore I think that, without entering into the particulars of the case, the *Master of the Rolls* has done right, for no case can be cited where parties have made a bargain with their eyes perfectly open and no surprise whatsoever, as in this case, in which the Court has refused to decree a specific performance. Here is no mistake of the object, as in *Hick v. Philipps*; and as to the greatness of the price, *Adams* had a right to ask a large sum; and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill; for he went upon the notion

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notion of that, that he was sure of Mrs. *Day's* consent; and, if so, of that of the corporation.

*Decree affirmed (a).*

(a) Vide *Jackson v. Lever*, post, vol. iii. 605.

May 1784.

OLIPHANT v. HENDRIE.

Money to be laid out in the purchase of heritable security in Scotland not within the statute of mortmain.

**A.** By will, gave the sum of £300 to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied toward the education of 12 poor children.

It was contended to be a void bequest, within the statute of mortmain, analogous to land, as being a bond that would descend to the heir of the obligee.

But Lord Chancellor held it to be a good bequest (a).

(a) In *Mackintosh v. Townsend*, 16 Ves. 330, Lord Eldon directed the Register's Book to be searched for the present case, when it was found that there was nothing special in it, and

accordingly his Lordship in that case established a legacy to be laid out in land in Scotland. Vide also *Campbell v. The Earl of Radnor*, ante, 271. *Curtis v. Hutton*, 14 Ves. 537.

Lord Thurlow.  
Lincoln's-Inn  
Hall, 24th May,  
1784.

BIRCH v. CORBYN.

The question being, whether the plaintiff has a lien upon stock, the Court will not order the bank to permit a transfer.

**T**HE plaintiff *Birch* had filed a bill, claiming an equitable lien on certain stock purchased with money remitted by Mr. *Corbyn* from *Virginia*, in respect of money laid out and paid by the plaintiff, for the use and in the education and payment of the debts of three of Mr. *Corbyn's* sons, who had come over to *England*, and applied to the plaintiff for that purpose; which money the plaintiff charged by his bill was remitted for the purpose of satisfying his demands. The stock stood in the names of *Corbyn* and *Athawes*, in trust for *Corbyn*. The bank, hearing of this suit, refused to permit a transfer of the stock.

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It was now moved on the part of the defendant, that the bank might be ordered to permit a transfer, but

Lord Chancellor said, this was in fact requiring a decree in the cause, by an interlocutory order; for the defendant undertakes to prove, that the plaintiff has no lien on this stock; and this is to be made

made out by reading the answer, which could not be read by the defendant upon hearing the cause. It is impossible to make an order upon the stake-holder to quit the stakes, which is the main object in dispute in the cause.

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BIRCH

v.

CORBYN.

S. C.

1 Cox, 102.

Lincoln's-Inn  
Hall, 27th May,  
1784.

Bill to be quieted in possession of a mill; and that defendants might pull down works about it and be restricted from erecting others: demurrer because plaintiff had not established his right at law allowed.

## (b) WELLER v. SMEATON.

THE plaintiff, who was lessee of an ancient mill on the river *Ravensburne*, filed his bill against the defendant, stating his own title, and charging that the defendant had erected certain flood-gates, and other works upon the said river, above the plaintiff's mill, for the purpose of conveying the water of the said river to *Deptford* and *Greenwich*; whereby the plaintiff's mill was obstructed, and that the defendant had no right to erect such works, &c.; and praying that the plaintiff might be quieted, by the injunction of this Court, in the possession of his mill, and that the defendant might be decreed to pull down his several works, and be restrained by injunction from building any other works, &c.

To so much of the relief prayed as required the works to be pulled down, and the defendant to be restrained, &c. the defendant demurred, for that the plaintiff ought to have established his right at law in the premises before he required the aid of this Court.

Mr. Mansfield, Mr. Madocks, and Mr. Stanley, for the plaintiff:

The case of *Bush v. Western*, Pre. Ch. 530, proves that this kind of suit is properly brought in this Court, in the first instance, without being driven previously to law. It is analogous to the cases of diverting watercourses, which this Court has expressly made a head of equity. There are several cases in Viner, *Tit. Chancery*. So *The Mayor of York v. Pilkington*, 1 Atk. 282. *How v. Tenants of Bromsgrove*, 1 Vern. 22. *New Elm Hospital v. Andover*, *ibid.* 266. Besides, this demurrer being merely to the relief, a full discovery is now obtained; and it will put the parties to a new and unnecessary trouble and expence. It is not at all the same case as where a plaintiff applies for an injunction.

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Mr. Scott and Mr. King, for the defendants:

This Court will never permit a bill of this kind until the right is established at law, for this is a dispute between two individuals

(h) *Northleigh v. Lascombe*, Ambl. 612.

respecting

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respecting a right in which no third person is concerned, and therefore cannot be said to prevent any multiplicity of suits; *Lord Teynham v. Herbert*, 2 Atk. 483. *City of London v. Perkins*, 4 Bro. P. C. 157 (a). Via. Tit. Chan. 425, pl. 35. *Whitchurch v. Hide*, 2 Atk. 391.

*Lord Chancellor*.—I take it to be a head of equity to interpose, by way of injunction, when a party is erecting new works upon an old possession; but when the works have been permitted to remain three years, that it is considered as such a laches as to preclude the party from having relief here, without going first to law (b). In this case, it has been put upon this ground, that it is within the equity of this Court to take, *ex ab origine*, a question whether or not a right is violated. It struck me immediately, from a general recollection of the cases, that the Court have exercised no such jurisdiction. There are two ways in which applications to this Court have been made in this kind of cases; First, in order to compel the party to try the right, which was one part of the case of *Welby v. The Duke of Rutland*, 7 Bro. P. C. 755 (c), in the House of Lords: Secondly, To prevent a multiplicity of suits (d), which was a point in the same case; most of the cases on the subject had been looked into upon that occasion, and it was found that in no instance, except that of *Bush v. Western*, this Court had ever interposed in a mere question of right between A. and B. they having an immediate opportunity of trying the right at law, which would be definitive. If, after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this Court to interpose by way of injunction, but merely when one party claims, and another denies a right, it is impossible for the Court to entertain the bill.

*Demurrer allowed (e).*

(a) Ed. Toml. vol. iii. 602.

(b) So, in the case of *The Birmingham Canal Company v. Lloyd*, 18 Ves. 515, the Court refused to interfere by injunction, after a laches of two years, until the right had been established at law: and as to the effect of laches in these cases, vide *Agar v. The Regent's Canal Company*, Coop. Rep. 77.

(c) Ed. Toml. vol. ii. 39.

(d) As to the doctrine respecting bills of peace, vide *How v. The Tenants of Bromsgrove*, 1 Vern. 22. *New Elm Hospital v. Andover*, ib. 266. *Weekes Slade*, 2 Vern. 301. *Arthington v. Fawkes*, ib. 356. *Brown v. Vermuden*, 1 Ch. Ca. 272. *City of London v. Per-*

*kins*, cit. sup. *Cowper v. Clerk*, 3 P. W. 155. *Mayor of York v. Pilkington*, 1 Atk. 282. *Conyers v. Lord Abergavenny*, ib. 285. *Lord Teynham v. Herbert*, 2 Atk. 483. *Whitchurch v. Hide*, ib. 391. *Welby v. The Duke of Rutland*, cit. sup. *Wake v. Conyers*, 1 Eden, 335. *Dilly v. Doig*, 2 Ves. jun. 486. *The Attorney-General of the Prince of Wales v. St. Aubyn*, Wightw. 167. *Devonshire v. Newenham*, 2 Scho. & Lef. 199.

(e) As to the doctrine of the Court with respect to interfering by injunction in cases of trespass, vide *Robinson v. Lord Byron*, post, 588; in cases of nuisance, *The Attorney-General v. The Foundling Hospital*, post, vol. iv. 165.

PERKINS



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## PERKYNs v. BAYNTON.

1784.

IT was agreed by the counsel on both sides, and by Mr. *Dickins* the register, that when subsequent interest was directed to be computed, it was the course of the Court, in case of a mortgage, to compute such interest on the principal and interest reported due; but in cases of bonds or legacies, to compute it on the principal only, and that this was established by Lord *Macclesfield*, in a case reported in *Peere Williams* (1 P. W. 453 \*). This was the case of a sum of money charged by will on land, as a reward for care taken of testator's daughter, who was a lunatic, and

Lincoln's-Inn  
Hall, May 28th,  
1784.

Subsequent interest on a mortgage to be calculated upon the principal and interest reported due; but upon bonds or legacies on the principal only.

Lord Chancellor considered this as the common case of a legacy, and directed the interest on the principal sum only (a).

\* See also 1 P. W. 480. 653.—1 Ves. 496.

(a) See the whole of the doctrine upon this point in *Creuze v. Lowth*, post, vol. iv. 316, and the Editor's note to it.

## NEALE v. WADESON,

AN order had been obtained by the plaintiff for an injunction for want of an answer, as a motion of course. Mr. *Harvey* now moved to set aside that order for irregularity, on the ground of the bill having been referred for impertinence before the time for answering was out; and contended, that referring the bill for impertinence, stayed of course all proceedings in the cause; and he cited a case of *Harris v. Montgomery*, Hil. 1783, for that purpose.

Lord Chancellor said, that the rule was not generally, that referring the bill for impertinence stayed all proceedings: but was only this: that upon a bill's being referred before the time for answering is out, the plaintiff should not, at the expiration of the time, move for an injunction, as of course for want of an answer, but should be in the same situation as if the time for answering was not out; in which case he must move it upon notice and affidavit of circumstances. If this case therefore had rested on the single ground aforesaid, the plaintiff would not have obtained the injunction, without giving notice of motion; but it afterwards appeared, that the defendant's clerk in Court had taken upon himself to wave taking advantage of the irregularity, by agreeing that the plaintiff should take an injunction as for want of an answer.

S. C.  
1 Cox. 104.  
Lincoln's-Inn  
Hall, June 8th,  
1784.

When a bill is referred for impertinence before the time for answering is out, the plaintiff cannot have an injunction, as of course, but must move it on notice and affidavit.

*Ex parte*

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1784.

(i) *Ex parte* WEST.

Lincoln's-Inn,  
Hall, June 10th,  
1784.

A survived share  
shall not survive  
again without  
express words.

In the Matter of SCAIFE, a Bankrupt.

**T**HIS was the petition of the bankrupt. The only question arose upon the following clause in a will: "I leave to *A. B.* and *C.* sons of *Arthur Scaife*, £1,000 each, the interest to be added to the principal yearly, until they shall respectively attain the age of twenty-one years; and in case any of them shall die before that age, then to the survivors." *A.* died, and then *B.* both under twenty-one years of age. The question was, whether that part of the share of *A.* which survived to *B.* upon the death of *A.* survived afterwards to *C.* upon the death of *B.* or whether *B.*'s original share only survived.

*Mr. Madocks* insisted it was an established principle in this Court, that a survived share shall not again survive, without express words, or manifest intention for that purpose; and cited *Rudge v. Barker*, For. 124, and the opinions of *Lord King* and *Lord Holt* there mentioned, as fully establishing this doctrine.

*Mr. Scott* on the other side, cited *Pain v. Benson*, 3 Atk. 78.

*Lord Chancellor*.—It is impossible for me to determine this survived part to survive again, without contradicting *Lord Talbot's* decision. The question is, whether the word *share*, in the case cited, does not mean all that the party took under the will, which would take in the survived part as well as the original share, and which I should think a very natural construction: but here are cases in point expressly determined otherwise. I own it struck me forcibly from the first that the whole ought to survive; but I cannot find any difference between this and the cases cited; and I do not care to overturn a decision sitting in bankruptcies when I can have no opportunity of re-considering my opinion. It is very necessary that the rules of construction, in wills, should be established; and I own I cannot make out any distinction in this case. As to the case of *Pain v. Benson*, it seems to me that *Lord Hardwicke* disapproved of the general rule, which induced him to endeavour to find a distinction. I cannot agree with him in considering that case as an exception to the general rule, though perhaps I should in his opinion of the rule itself. However it will be too much for me to decide this, against the authorities, in a

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(i) 1 Cox's P. W. 276. N. 1. S. C.

petition

petition on a bankruptcy. If the parties choose to bring it before me in a more solemn way, upon bill and answer, I will give it more consideration.

The parties afterwards filed a bill, and the cause was set down before his Honour the *Master of the Rolls*, who decreed that the share did not survive a second time (a).

(a) By the name of *West v. Oliphant*, vide Mr. Cox's note to *Perkyns v. Micklethwaite*, 1 P. W. 275.

BOYNTON v. PARKHURST.

SIR *Griffith Boynton* having by will empowered his wife (whom he made executrix) to raise by mortgage of a particular real estate, a sufficient sum of money for payment of his debts, in aid of his personal estate: and having devised to his wife the use of her jewels for her life. The cause coming on for further directions, a question arose, whether the wife was not entitled to the jewels absolutely, as her paraphernalia; although the personal estate was not sufficient to pay the debts, or whether they should be applied before the real estate charged with the debts, and on the authority of *Tipping v. Tipping*, 1 P. W. 729.

Lord Chancellor decreed the jewels to the wife, in prejudice of the charged estate (b).

(a) Vide *Aldrich v. Cooper*, 8 Ves. 397; also *Ridout v. Lord Plymouth*, 2 Atk. 104. *Graham v. Lord Londonderry*, 3

Atk. 393. *Clancey's Equitable Rights of Married Women*, 2d ed. 61. et seq.

Ex parte COBHAM.

A SEPARATE commission having been taken out against *Ferryman*, who was one of three partners, the joint creditors now petitioned to be admitted to prove their debts under the separate commission.

Lord Chancellor said, he was aware that this point had never been decided, although it had been usual for the commissioners to refuse the proof of joint debts under separate commissions; but he did not see why the rule that applies to the case of separate creditors proving their debts under a joint commission, did not apply to this case. His only doubt was, to what extent this benefit should be allowed. It would be hard that the joint creditors should come upon the separate estate to the prejudice of the

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1784.

Ex parte  
WEST.

S. C.  
1 Cox, 106.  
Nom. *Boynton*  
v. *Boynton*.  
June 14th, 1784.  
Jewels of the  
wife, though  
given by hus-  
band's will to her  
for life, shall not  
be sold for pay-  
ment of hus-  
band's debts,  
charged on a real  
estate in aid of  
personalty.

Lincoln's-Inn  
Hall, Dec. 24th,  
1784.

Joint creditors  
let in to prove  
against a separate  
estate by consent.

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*Ex parte*  
COBHAM.

the separate creditors, and still have an exclusive power of coming upon the joint estate; but the separate assignees might, if they pleased, possess themselves of the bankrupt's proportion of the partnership effects; and then he thought the justice of the case would be, that both the joint and separate creditors should come in, *pari passu*, upon both funds. But as the present petition was consented to, he would make the order now upon consent, and leave the point for the present, where he found it, to be decided hereafter, upon more consideration\*.

\* Vide *Ex parte Hodgson*, vol. ii. p. 5.

Lincoln's-Inn  
Hall, Dec. 22d,  
1784.

*Ex parte* NICHOLLS.

Exceptions will not lie to a Master's report of maintenance, and a title set up against that of the infant cannot be taken notice of, but must be established elsewhere.

**I**T having been referred to the Master to consider of a proper maintenance for the infant *Nicholls*, out of the real and personal estate of his father (who died intestate:) *A. B.* came before the Master, and objected to the maintenance allowed by the Master's report, insisting that the infant was illegitimate, and that he was heir at law, and one of the next of kin of the infant's father: but he had no evidence, before the Master, in support of these facts: the Master therefore made his report of maintenance, and *A. B.* now excepted to this report upon the same grounds, which were now supported by affidavits; but

*Lord Chancellor* said, that exceptions would not lie to a report of maintenance; and moreover, that it was impossible for him to take notice, in this form, of *A. B.*'s title, which must be first established elsewhere.

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*Ex parte* BECK.

Same day.

*A Petition in Patents.*

A patent bearing date 12th *August*, but the caveat not discharged till the 27th; the patentee supposing it bore date the latter day, did not enrol till the 18th *December*, when the four months had expired: the date of his patent cannot be altered.

**A** CAVEAT having been entered against putting the great seal to a patent, for an invention, which bore date 12th *August*, 1784, the *Lord Chancellor*, upon hearing the petition, took some time to consider of it, and did not make his order for discharging the caveat until the 27th *August*. The patentee did not enrol his specification until the 18th *December*, 1784, supposing the patent bore date the day the final order was made: but he was then told the four months, limited by the act of parliament for the enrolment of specifications, had elapsed.

The patentee now petitioned the *Lord Chancellor* to alter the patent, by making it bear date the 27th of *August* instead of the 12th; but

*Lord*

*Lord Chancellor* said, that although he was perfectly satisfied that the patentee was well entitled to his patent, and that his case was a very hard one; yet he could not make such an use of his power, as keeper of the great seal, as to alter a patent, in any degree, upon an application of this sort. That perhaps, upon the petitioner's applying for a new patent, the officers might, under these circumstances, be induced to remit their fees: but that he could give no relief upon the present petition (a).

(a) Nor can the time for enrolment after the patent has passed be enlarged by the Keeper of the Great Seal. *Ex parte Koops*, 6 Ves. 599.

HOARE v. PARKER.

**T**HE bill stated, that *James Stuart*, by his will dated 1st December, 1752, gave and bequeathed to *Robert Long*, *Henry Rower*, and *Robert Greenaway*, their heirs and administrators, all his estate, both real and personal, upon the trusts thereafter mentioned; and particularly, the said testator gave and bequeathed to his wife *Mary Stuart*, for and during her life, (in case she should so long live sole and unmarried; but not otherwise,) the use and usage of such and so much of his plate as she the said *Mary Stuart* should think fit, choose, and be desirous to have the use of; and the said testator thereby directed his said trustees to cause an inventory or schedule to be made of the several particulars, whereof his said wife should make choice, and that under such inventory or schedule, they should take her acknowledgment in writing, signed by her own hand, of the receipt thereof, and of her having the same in her custody, to the end that they might be enabled, in case of her death or marriage, to recover the said plate: and the testator then proceeded to dispose of the rest of his real and personal estate, for the benefit of his son and his issue, in the manner therein mentioned, and appointed the said *Robert Long*, *Henry Rower*, and *Robert Greenaway*, executors: That after the death of the testator, his widow *Mary Stuart* made choice of some of the plate, and subscribed a receipt for the same: That *Mary Stuart* died on the 14th December, 1782, by which her interest in the said plate ceased;—but that the said *Mary Stuart* in her life-time pawned the whole or the greatest part of the said plate to the defendant for some considerable sum of money: That the plaintiffs (who were the assignees, in trust, of the representative of the surviving trustee and executor under the will of the said testator,) had commenced an action at law, against the defendant for the recovery of the said plate; but that they could not proceed therein for want of a discovery of what articles of plate were pawned to the said defendant; and the bill therefore prayed

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1784.

*Ex parte*  
BECK.

S. C.  
1 Cox, 224.  
Lincoln's-Inn  
Hall, Jan. 17th,  
1785.

Bill filed to discover articles pawned to defendant; he pleads that he lent money without notice of plaintiff's claim; the plea should aver that he has no other articles than those specified; and although this was sworn in the answer, that is not sufficient.

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HOARE  
v.  
PARKER.

prayed that the said defendant might set forth and discover a full and particular account of all and every the several pieces and parcels of plate late belonging to the said testator so pawned or pledged, or pretended to be pawned or pledged by the said *Mary Stuart*, or by any person or persons by her order, or for her use, with him the said defendant, together with the several days and times when the same was or were so respectively pawned or pledged; and the respective sum and sums of money lent and advanced, or pretended to be lent or advanced on each particular article, with true copies of all entries in his books of accounts, papers, or memorandums, original or duplicates, of such pawns or pledges, or in anywise relating thereto, in order to enable the plaintiffs to proceed to trial in the said action, to recover back from the said defendant the said plate so pawned or pledged, or pretended to be so pawned or pledged as aforesaid.

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To this bill, the defendant pleaded, that on the 6th day of *April*, and 31st day of *August*, 1781, &c. during all which time defendant carried on the business of a pawnbroker, the said *Mary Stuart* being possessed of certain pieces of plate, and claiming the same as, and alledging the same to be, her own absolute property, and the same so appearing to defendant, the defendant did, *bonâ fide*, advance and lend to the said *Mary Stuart*, or for her use, several sums of money, (to the amount therein mentioned) all which sums of money were really and *bonâ fide* advanced and paid by defendant to the said *Mary Stuart*, on the said days accordingly, and the said *Mary Stuart*, or her agent, at the same time deposited and pledged the said pieces and parcels of plate respectively with defendant, as a security for the said sums of money respectively; defendant then averred that the said monies never were repaid, and that he did not at any or either of the respective days, when the pieces or parcels of plate which were pledged or pawned by the said *Mary Stuart* with him as aforesaid, were pledged or pawned, or at any time before the death of the said *Mary Stuart*, know or had any notice or information, or suspicion of the will of said testator, &c. &c. Defendant then by answer denied notice, and said that the said *Mary Stuart*, or any persons on her behalf, never pledged or pawned, with defendant any plate whatsoever, except the pieces of plate mentioned in the plea; and that he had not, nor ever had in his possession or power any other plate whatsoever, in which the said *Mary Stuart* had any interest (a).

Mr. *Hollist*, in support of this plea, insisted—that the defendant being a purchaser for a valuable consideration, without notice, was not bound to assist the plaintiff by a discovery; and cited *Snelling*

(a) The plea and answer are given at full length in Mr. *Cox*'s report of this case.

v. *Squibbs*,



v. *Squibbs*, 2 Ch. Ca. 47. *Perrat v. Ballard*, *ibid.* 72. *Abery v. Williams*, 1 Vern. 27.

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HOARE  
v.  
PARKER.

Mr. *Madocks* and Mr. *Stainsby*, for the plaintiffs, insisted—that the rule of this Court, which says that purchasers without notice, and for a valuable consideration, shall not be bound to discover, only goes to a discovery of their title, and not of the particular things enquired after being in their possession, which last is the object of the present bill; and Mr. *Stainsby* mentioned the case of *Hartop v. Hoare*, 3 Atk. 44, to shew how courts of law considered cases of this kind; it was also insisted, that this plea, mentioning only some specific articles of plate which were pawned, and not averring that no other articles of plate were so, (though that *was* done by the answer) did not meet the point made by the bill; as it did not appear that the specific articles mentioned in the plea, were the same as those enquired after by the bill.

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*Lord Chancellor* said—that he could not see any room to make a distinction between the cases of a discovery being sought for of the title of the purchaser, and a discovery of the specific things in his possession; but the same rule must apply to both, namely, that a purchaser without notice, and for a valuable consideration, is not bound in conscience to assist the right owner in the legal recovery of the subject purchased under such circumstances. He therefore thought that no objection to the present plea.—But the other objection, that it was not averred by the plea that no other articles (except those specified) had been pawned to the defendant, seemed to him to be a good objection; and it was not sufficient to aver that by an answer: which would be, in fact, making the answer supply the defects of the plea instead of supporting it. The plea ought to have gone to aver that defendant had no articles in his possession but those specified before; for otherwise it is saying that the defendant, having lent money on *certain* articles, shall be a reason why he should make no discovery as to any others: upon this objection, therefore, the plea must be over-ruled (a).

(a) It appears by Mr. *Cox's* report of this case, that the defendant put in a further answer, whereby he answered some few facts; but instead of answering the several circumstances intended to be covered by his former plea, he insisted upon the same matter by his answer, in bar to such discovery. Exceptions taken to the answer were

allowed, and a subsequent application to amend the plea refused. As to the proper averments to a plea, vide *Mitford on Pleading*, 211, et seq. *Beames's Elements of Pleading*, 23, et seq. *Butler v. Every*, post, vol. iii. 80. As to amendment of plea, *Newman v. Wallis*, post, vol. ii. 143.

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February, 5th,  
1785.

Upon a bill to  
redeem a mort-  
gage and non-  
payment at the  
time appointed;  
it is a motion of  
course to dismiss  
the bill.

## STUART v. WORRALL.

**B**ILL to redeem, decree for redemption; in default of payment,  
at the time to be appointed by the Master, the bill to be dis-  
missed with costs.

Report of money due, and affidavit of attendance at the time  
and place appointed by the report, and of non-payment.

Motion (as of course) to dismiss the bill with costs. Ordered  
accordingly, and said by the Register to be the usual way.



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Rolls,

Feb. 1st, 1785.

Testator gave to  
the children of his  
sister at twenty-  
one; and if any  
died before, to  
the survivor  
and survivors:  
A child born after  
the testator's  
death, but during  
the infancy of the  
others, is entitled  
to a share.

## (k) GILMORE v. SEVERN.

**T**ESTATOR gave to the children of his sister *Jane Gilmore*,  
wife of *Thomas Gilmore*, £50, with interest for the same,  
to be paid them respectively, their equal shares and proportions as  
they should respectively attain twenty-one, and in case any of them  
should die under twenty-one, then their shares should go to the  
survivors and survivor.

At the death of the testator, *Jane Gilmore* had two children,  
the plaintiffs; afterwards she had another child: the plaintiffs  
were both infants; and the Court was of opinion, that the youngest  
child, being born during the infancy of the other two, though after  
the death of the testator, might be entitled to a share.

As none were entitled to a vested interest, the Court ordered  
the money to be paid into the bank (a).

(k) *Congreve v. Congreve*, ante, 530.

(a) Vide *Hughes v. Hughes*, post, ibid. 401, and the Editor's note to the  
vol. iii. 434, and *Andrews v. Partington*, latter case.

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S. C.

1 Cox, 165.

Rolls,

Feb. 3d, 1785.

## SOWDEN v. SOWDEN.

**R**OBERT SOWDEN, being about to marry *Mary Row*, by settlement previous to the marriage, bearing date September, 1779, in consideration of £1,050, her marriage portion, covenanted to pay to the trustees £1,500, to be laid out in the purchase of some freehold estate of inheritance in the county of *Devon*, upon trust, out of the rents and profits thereof, to pay to *Mary Row* an annuity of £15 *per annum*, for her life, in case she survived her said intended husband; and, after the decease of both, to raise by sale £1,500, or £2,000, as the case might be, for the portion or portions of the child or children of the marriage, in such shares, &c. as the survivor should appoint. He also covenanted to pay to the trustees the further sum of £500 at the least, to similar uses: and that, in case the lands purchased should not sell for £2,000, the deficiency should be made up out of his personal estate. *Robert Sowden* did not pay the £1,500 or £500, to the trustees, but soon after his marriage purchased a freehold estate called *Pound*, for the price of £2,150, and the estate was conveyed to him and his heirs; and he died without making any settlement of that estate, leaving *Mary* his widow, *Thomas* his son and heir at law, and *Mary* his daughter, who were the only children of the marriage. He died seised and possessed of other real and personal estate; the real estate descended on the eldest son, and the widow took out administration of the personal estate.

*A.*, by marriage settlement, covenanted to pay money to trustees, to be laid out in the purchase of lands: *A.* did not pay the money, but purchased a freehold estate; decreed it to be subject to the trust.

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The daughter filed her bill against the son and widow praying that the trusts of the settlement might be decreed to be performed, and that the estate called *Pound*, might be declared to be subject to the trusts of the settlement, or that the £2,000, covenanted to be paid by her father, might be raised out of his personal estate, if sufficient, or the deficiency made good out of his real estate, and the £2,000, when raised, might be applied according to the trusts of the settlement.

The cause was heard on the day of *December*, 1784, and 3d of *February*, 1785, when the following cases were cited.—*Took v. Hastings*, 2 Vern. 97. *Roundell v. Breems*, *ibid.* 482. *Wilcox v. Wilcox*, *ibid.* 558.—*Bridges v. Bere*, 2 Eq. Ab. 34.—*Wilks v. Wilks*, 5 Vin. Ab. 293.—*Lechmere v. Lechmere*, For. 80. 3 P. W. 211.—*Coffin v. Dyke*, or *Dyke v. Leeds*, 7th July, 1740. *Deacon v. Smith*, 3 Atk. 323.—*Attorney-General v. Whorwood*, 1 Ves. 534.—There were also mentioned, 5 Bro. P. C. 552.—*Edwards v. Freeman*, 2 P. W. 435. 665—*Lewis v. Hill*, 1 Ves. 274.

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Some parol evidence was offered to shew the intention of *Robert Sowden* in purchasing the estate was to perform his covenant, and it was read, but it was very slight.

(a) His Honour was of opinion, the evidence ought not to be admitted. He thought *Lechmere v. Lechmere*, decided the case. He conceived the principle established to be, that "where a man is bound to do an act, and he does what may enable him to do the act, it shall be taken to have been done by him with the view of doing that which he was bound to do."

He therefore was of opinion, that the *Pound* estate was to be considered as purchased by *Sowden*, with a view to perform the covenants in the settlement, and therefore was bound in equity to the performance of them; and decreed accordingly (1) (b).

(1) Reg. Lib. B. 1784, p. 171.—*Robert Sowden*, by marriage settlement, reciting that, with his intended wife *Mary*, he would have £1,050, and that it had been agreed that he should assign to trustees several leasehold estates, and also that he should pay to them £1,500, to be laid out in the purchase of some freehold estate of inheritance in the county of *Deron*, upon trust, out of the rents and profits thereof, to pay to *Mary* an annuity of £15 for her life, in case she survived, and after the death of the survivors of them, to raise the several sums of £1,500 and £2,000 for portions. It was thereby witnessed, that he did assign to the trustees therein named, the said leasehold estates for his life, and after his death to her for life, and after their deaths, in trust, for his executors; and also reciting, that as a further provision for his wife, he had actually paid the £1,500, and had agreed to pay a further sum of £1,500, within the time, and upon the trusts, therein mentioned; and for that purpose, he covenanted with the plaintiffs, the trustees, within the space of six months, to pay the sum of £500 at least; which said sums of £1,500 and £500, making £2,000, were to be applied upon trust, as soon as conveniently might be, with the consent of *Sowden*, to lay out and invest the same, either together or in parcels, and with or without any further sum to be advanced by *Sowden*, in purchase of some freehold estates in the county of *Deron*, and that the same, when purchased, should be conveyed to the use of *Sowden* for life, without impeachment of waste, and after his death, out of the rents and profits, to pay to *Mary* his intended wife, £15 in addition to the provision, and in full for her jointure, and in bar of dower, and after payment thereof, to pay the residue, during the life of *Mary*, to such person, and in such shares, as he should, by any deed or writing, or will, &c. appoint, and in default thereof, then in trust for his heirs and assigns, and after the death of both, then to sell the same, or a competent part thereof, and with the monies, if not amounting to £2,000, but if they should amount to upwards of £2,000, then to pay £2,000 to and among the children, as they should appoint, and in default, then equally, and if but one child, then to raise £1,500 only, and if no child, or the lands should remain unsold after the several payments aforesaid, then to convey the same to the heirs and assigns of the said *R. Sowden* for ever, or if any overplus after the sale of the lands remaining, after payment of the £2,000, or £1,500, then to pay the same unto the executors, and till the purchase could be made, to place the said £2,000 at interest, upon mortgage, or in government securities, and if such purchases should not be made during the lives of *Sowden* and his wife, or the survivor, then to pay the said £2,000, or a competent part thereof, to the same uses.

There were two children, the plaintiffs *Mary* and *Thomas Sowden*; *Sowden*, the settlor, never paid the £1,500 or £500, but purchased a freehold estate called *Pound*,

(a) The judgment is much more fully given in Mr. Cox's report.

(b) For the cases upon the subject of satisfaction and performance, vide

*Haynes v. Mico*, ante, 129. *Jeacock v. Falkener*, ibid. 295. Mr. Swanston's note to *Goldsmid v. Goldsmid*, vol. i. 211.

*Pound*, in *Whitstone*, in the county of *Deron*, for £2,150, and he intended to have conveyed the same to the plaintiffs, the trustees, to the uses of the settlement, but he died, without having done so, intestate, and without having made any appointment, leaving his widow, and *J. Sorden* his son and heir at law, being possessed of personal estate, and a considerable real estate, exclusive of the property in question.

The bill prayed that the estate called *Pound* might be declared to be subject to the trusts of the said settlement, and the defendant, the heir at law, might, upon his attaining twenty-one years of age, convey the same to the plaintiffs, the trustees, upon the trusts of the said settlement, and that the contract entered into with the defendant *Harrey* might be performed.

His Honour doth declare, that the estate purchased by the said intestate *J. Sorden*, called *Pound*, in the parish of *Whitstone*, in the county of *Deron*, is to be considered as an estate purchased by him with the sum of £2,000, and upwards, pursuant to the covenant entered into by him in the settlement made on his marriage with the defendant *Mary Sorden* his widow, bearing date the 15th of *September*, 1779. And the defendant *H. Hervey* the purchaser, by his counsel, declaring himself content with the title of the estate purchased by him, his Honour doth declare the contract for the said purchase ought to be considered specifically performed.

See *Perry v. Phelps*, 4 Ves. 108, *è contra*. The circumstances of the case not affording a presumption that the trustees intended to purchase as a performance of the trust (a).

(a) This decision was brought under the consideration of the Court, 17 Ves. 173; and the case received a similar determination, with the additional circumstance being thrown out, that there was considerable doubt whether the trust could have been extended at all during the life of the trustee. So in *Lench v. Lench*, 10 Ves. 511, where

money was settled, with power to the trustees to invest it in land, it was held, that there was no lien upon estates purchased by the husband, who had obtained the money from the trustees, the circumstances not raising the presumption, as if he had been under an engagement to purchase.

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(m) JAMES HIGHWAY, ELIZABETH BRADLEY, Widow, Relict and Executrix of the last Will and Testament of THOMAS BRADLEY, deceased; THOMAS BRADLEY and ELIZABETH BRADLEY, Infants, by the said ELIZABETH their Mother, and next Friend (the only Children of the said ELIZABETH BRADLEY, Widow, by the said THOMAS BRADLEY, deceased,) JOHN WELCH, and MARY his Wife, THOMAS PHILPOTT, and JOHN CORBETT, Assignees of JAMES WATTS ROMNEY, under a Commission of Bankrupt - - - - - } Plaintiffs.

WILLIAM JOHN BANNER, DANIEL WINWOOD, WILLIAM PHILLIPS, and ANN his Wife, JAMES BALL, JOHN HIGHWAY, JAMES WATTS ROMNEY, and DOROTHY his Wife - } Defendants.

Rolls,  
25th April, 1785.

Settlement on marriage, to the husband for life, remainder to wife for life, remainder to the heirs of their bodies, a strict settlement, but not so where the power of barring the entail is given to both.

**F**RANCIS HIGHWAY, in 1739, held certain estates of the manor of Chadgley, alias Chaddesley Corbett, by copy of court roll, *sibi et suis*, but not at the will of the lord; the words *sibi et suis* are considered as giving an inheritance. By the custom of the manor, the copyhold lands descend upon the eldest son of the tenant, according to the rule of the common law; but on failure of sons, the lands descend upon the eldest daughter alone, as customary heir.

Francis Highway, by articles of agreement dated the 24th of June, 1734, and made previous to his marriage with Dorothy Cave, between Francis Highway, of the one part, and Mary Cave, widow, and Dorothy Cave, her daughter, of the other part, in consideration of the intended marriage, and of £1,000 to be paid by Mary Cave, as a portion with Dorothy, covenanted with Mary Cave, at any time after the marriage, at the request of Mary Cave, to surrender his copyhold lands to the use of himself for life, remainder to his intended wife Dorothy Cave for life, in lieu of dower; and from and after the deceases of Francis and Dorothy, to the use of the heirs of her body by him, if he survived her; but if she survived him, to the heirs of his body on her body to be begotten, remainder to his own right heirs; and after taking notice, that by the custom of the manor, Dorothy would be entitled to the land for life, for her free bench, if she survived him, unless he should do some act to prevent it. He further covenanted with Mary Cave, her executors, administrators, and assigns, that he had not done, and would not thereafter do any act to prevent Dorothy from holding or enjoying the premises during her life, for her free

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(m) Reg. Lib. A. 1784. 670.

bench,



bench, or to prevent the same descending to the heirs of his body by her, immediately after her death, or do any act to charge, mortgage, or incumber the said estate, or any part thereof; and likewise covenanted, that in case *Dorothy* should die before him, and before such surrender should be made as aforesaid, leaving issue, that he would within three months after her death, surrender the said premises, free from incumbrances, to the use of himself for life, and after his death to the use of the heirs of the body of *Dorothy* by him, with remainder to his right heirs.

*Francis Highway* and *Dorothy Cave* afterwards married, and had issue several sons and daughters; the eldest of which sons, *Thomas*, married without his father and mother's consent, whereby he disobliged them.

On the 8th of *April*, 1760, *Francis Highway* surrendered the estates to the uses mentioned in the marriage articles, and *Francis* was admitted accordingly; and at the same Court, he and *Dorothy* his wife, surrendered the estates to the use of *Francis* and *Dorothy* for their joint lives, and the life of the survivor, and after their deaths to the use of *Thomas* their eldest son for life, and after his death to the first son of *Thomas*, who should live to attain twenty-one, and the heirs of such first son for ever; and for want of such issue male of *Thomas* who should live to attain twenty-one, to the use of such person or persons, and for such estate and estates, and in such manner, as the said *Francis Highway* should by deed or will appoint.

*Francis* by his will dated 16th *September*, 1772, after taking notice of the above surrender, devised the whole of the copyhold estates (except a dwelling-house, with its appurtenances) to his son *Thomas Highway* and his heirs for ever, subject to the payment of £1,200 for the benefit of some of his younger children, and other issue, to be paid at the end of six months after the decease of the survivor of *Francis Highway* and *Dorothy* his wife, in the manner and proportions mentioned in the will. *Francis Highway* died 21st *December*, 1772. On his death his widow entered, and was admitted tenant, and enjoyed for her life, and *Thomas Highway* was admitted tenant, subject to the estate for life of his mother, and surrendered to the use of his will; and, by his will, devised the estates to the defendants *Banner* and *Winwood*, and their heirs, upon certain trusts. *Thomas* afterwards died without issue.

On the death of *Thomas*, *John* his brother, as having an equitable estate tail under the marriage articles of his father and mother *Francis Highway* and *Dorothy* his wife, or under the first mentioned surrender, claimed the estates, and afterwards sold his interest therein to *Phillips*, who married the widow of *Thomas* and residuary devisee in his will; and *John Highway* was admitted tenant, and surrendered to *Banner* and *Winwood*, the trustees, upon the trusts in his brother *Thomas Highway*'s will.

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The bill was filed (among other things) to have the £1,200 raised. Several questions were made in the cause; first, whether the surrender in 1786, to the uses mentioned in the articles, was a due execution of the articles; and whether, by the subsequent surrender, *Francis Highway* gained an absolute power over the estate. Secondly, whether if *Francis Highway* had not a power to dispose of the estate; and whether *Thomas*, who was entitled to other property under his father's will, was not bound to make an election to abide by the will, or make a satisfaction for the £1,200 out of the other property devised to him; and whether he had not actually made his election, and barred the entail by the surrender to the use of his will; estates tail being barrable by surrender according to the custom. And thirdly, if the estate tail was not barred by the surrender of *Francis* and *Dorothy*, or by the surrender of *Thomas*, (which last surrender, being in the life-time of *Dorothy*, who was tenant for life, his Honour was of opinion would not operate to bar the entail); whether *John*, who also took benefits under his father's will, was not also bound to make an election.

His Honour, being clearly of opinion in favour of the plaintiffs on the first question, did not decide the other two; but intimated his opinion, that if *John Highway* took as a remainder-man, he was certainly bound to make an election; and distinguished the case from *White v. White* before Lord Bathurst.

Upon the first point, his Honour said—the principles on which the case had been argued, could not be controverted. The only doubt was, whether they applied to the case before him. In *West v. Erissey*, 2 P. W. 349. the rule had been settled, and since adhered to in many cases, particularly *Neale v. Neale*, before Lord Bathurst, (n) that articles for a settlement on a husband, and the heirs of his body, should be carried into execution as a strict settlement: and it had been considered as vain to make a settlement, which instantly might be defeated by a recovery. But the doctrine has never gone so far, where that party could not suffer a recovery alone. He said he did not know that the point had been decided; he must therefore decide as reason, and the principles of the cases decided, led him. He observed, that it was anciently a common mode of settlement to the husband for life, to the wife for life, and to the heirs of the body of the wife by the husband. It was thought a sufficient precaution to preserve the entail, that it could not be destroyed unless both husband and wife concurred; and it was thought better that the power should be given to the two parents concurring, than that the property should be absolutely tied up. With respect to the case before him, the limitation appeared to be anxiously worded: the concurrence of both parties was necessary

(n) Vide *Alpass v. Watkins*, *Easter Term Reports*, 1800, vol. viii. 516.

to destroy the entail; which ever survived, it was out of the power of the survivor. He thought he had no authority to say that this was not what the parties meant: that he could not put on the articles the construction contended for by the defendants: it would be interposing perhaps his wishes, instead of the intentions of the parties; but if his wishes were to interfere, he should endeavour to support what had been done, which appeared to him shew the wisdom of the mode of settlement: however, he was not to look to the impropriety of what had been done, but to the power which the parties had to do it: and he thought that point clear, which delivered him from the necessity of deciding on the question of election (a). On that point, however, he said he had no doubt. A question had been made, whether the doctrine of election applied to copyholds; but that had been decided by the Court of *Exchequer*, in *Standish v. Standish* \*. On the first point, he declared his opinion that the articles were properly carried into execution by the first surrender in 1768; and that the second surrender let in the disposition made by *Francis Highway's* will; and he decreed that the £1,200 was a good charge upon the said copyhold estate, and should be raised out of the same, according to the will, and gave the directions necessary for that purpose (b).

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\* *Frank v. Standish, Exchequer, 19th December, 1772.* A testatrix being seised of freehold estates, and some copyhold lands, lying dispersedly, and having surrendered her copyhold estates to the use of her will, by her will devised all her real estates, as well freehold as copyhold, and gave Lady *Standish*, who was one of her co-heirs at law, £1,000. After the making of her will, she exchanged those copyhold lands for others: which were surrendered to her, and did not surrender those to the use of her will. The cause had been heard a few days before, when the question was made, whether Lady *Standish* should be put to her election; and the Court this day gave judgment unanimously, that this case was within the reasoning of *Noys v. Mordaunt*, 2 Vern. 581; and Lady *Standish* having elected to take the £1,000 legacy, decreed that she and the other co-heirs should surrender the copyhold to the uses of the will.

(a) As to the question of election, vide *Lindopp v. Eborall*, post, vol. iii. 188, and the Editor's note.

(C. R. 102), where the whole of the doctrine upon this subject is entered into at large.

(b) See this case cited by Mr. *Fearne*,

## ROBINSON v. Lord BYRON.

May 7th, 1785.

**M**OTION for an injunction to restrain Lord *Byron* from preventing the water flowing to a mill which the plaintiffs used for a cotton manufacture, or letting a greater quantity of water than usual flow upon the mill.

Injunction to restrain defendant from preventing water flowing in regular quantities to a mill.

The motion was before appearance, upon affidavits which stated that, since the 4th of *April*, Lord *Byron*, who had large pieces of

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of water in his park, supplied by the stream which flowed to the mill, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill; and the affidavits contained strong expressions of Lord *Byron's* shewing that his object, in these proceedings, was to obtain money from the plaintiffs.

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*Lord Chancellor.*—The Court will not restrain what has been enjoyed for twenty years past; but if what has been so enjoyed is used in a different way, so as to do mischief, the Court may interpose.—His Lordship accordingly ordered an injunction to restrain Lord *Byron* from using dams, wears, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of April, 1785.

Afterwards his Lordship altered the terms of the order, and added the words, “so as to prevent the water flowing to the mill, in such regular quantities as it had ordinarily done before the 4th of April (a), (b).”

When the answer came in, it was insisted before the *Master of the Rolls*, sitting for Lord *Chancellor*, that the affidavits could not be read; but he was of a contrary opinion (c), (d).

(a) See a similar order to the present, in *Lane v. Newdigate*, 10 Ves. 192. As to injunctions in cases of covenant between landlord and tenant, vide *The Earl of Bathurst v. Burdon*, post, vol. ii. 64. As to injunction in cases of nuisance, *The Attorney-General v. The Foundling Hospital*, post, vol. iv. 165.

(b) The doctrine of the Court, in interposing in cases of trespass, as principally collected from the many luminous and instructive judgments of Lord *Eldon*, may be stated as follows. The application in the case of waste originally depended upon the privity of title acknowledged by the answer; and formerly, if the plaintiff either happened to state an adverse title in the defendant, or the defendant in his answer positively denied the plaintiff's title, injunctions were always either refused, or, having been granted, were dissolved. Even in two cases, both of them subsequent to the present, Lord *Thurlow* refused applications to stay waste, on the ground of the defendants being mere trespassers; though a very strong case of irreparable mischief is reported to have been made out in each of them. *Mogg v. Mogg*, 2 Dick. 670. *Mortimer v. Cottrell*, 2 Cox, 205. One of the first occasions in which this jurisdiction was exercised, was in a case which has been repeatedly cited

by Lord *Eldon*, and is sometimes called *Ilamang's* case. The plaintiff in that case being the proprietor of two adjoining closes, demised one of them to the defendant, who began to dig a mine in the one demised to him, and was proceeding to carry it into the other: the former was waste from the privity; but upon an application to extend an injunction to restrain the digging in the latter, Lord *Thurlow* felt the greatest reluctance to comply with it, and only consented at last on the ground of the irreparable ruin to the plaintiff if he did not. This was followed by the present case, and one of the name of *Hamilton v. Horsfold*, 10 Ves. 290, n. The practice has since become extremely common. *Mitchell v. Dors*, 6 Ves. 147. *Hanson v. Gardiner*, 7 Ves. 305. *Courthorpe v. Maplesden*, 10 Ves. 290. *Crockford v. Alexander*, 15 Ves. 158. *Earl Cowper v. Baker*, 17 Ves. 128. *Grey v. The Duke of Northumberland*, ibid. 281. *De Salis v. Crassan*, 1 Ba. & Be. 188. *Norrey v. Rowe*, 19 Ves. 144.

(c) As to reading affidavits in these cases, vide *Isaacs v. Humpage*, post, vol. iii. 563.

(d) For the subsequent proceedings in this cause, vide 2 Cox, 4, and, still later, 2 Dick. 703.

PITT

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## PITT v. BENYON.

**T**HE testator directed the interest of a sum of pagodas, to be paid to *A. B.* during her life; and after her death he gave the pagodas to his residuary legatees after-named. He then gave the residue of his estate to *Pitt* and *Benyon* as tenants in common.

*Pitt* died, *Benyon* survived, and died, plaintiff was representative of *Pitt*, defendant of *Benyon*, *A. B.* died.

It was insisted for the defendant, that the interest of *Pitt* and *Benyon* in the pagodas was a joint tenancy.

*Lord Chancellor* was of opinion, it was part of the residue; and that the residuary legatees were tenants in common of this, as well as of the other parts of the residue\*.

\* See *Perkins v. Baynton*, ante, p. 118.

May 7th, 1785.  
Gift of a particular fund for life, then to residuary legatees as such; then the residue given to them as tenants in common: the particular fund is part of the residue.

## OLIVER v. FREWIN.

**T**HIS was a bill filed by the next of kin, against the defendants the executors and other parties, for an account of the residue, &c.

The question was, whether the executors, some of whom had *unequal legacies*, and others none, or the next of kin, should take the residue. There was a clause in the will, directing that, in case any legatees should die in the life-time of the testator, their legacies should go to the executors. *Lawson v. Lawson*, 7 Bro. P. C. 511. and other cases cited in the case of *Bowker v. Hunter*, ante, p. 328. were recognized in the present case, but after a short argument the *Chancellor* dismissed this bill; being of opinion that the plaintiff had no right to a share of the residue, but that the same belonged to the executors (a).

(a) See the Editor's note to the case of *Bowker v. Hunter*, cit. sup.

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Trin. Term,  
June 7th, 1785.  
Some of the executors having unequal, and others no legacies, shall take the residue.

END OF THE FIRST VOLUME.

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